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IN THE

Supreme Court of the United States

October Term, 1967

No. 550

HARLAND JAY SIMPSON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

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No. .....

HARLAND JAY SIMPSON,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above-entitled case on May 24, 1967.

Opinions and/or Judgments Below.

On March 18, 1966, petitioner was found guilty by jury of the crime of violation of Section 148 of the California Penal Code. Judgment of conviction was entered in the Municipal Court of Ventura County, California, Fillmore Department, in the criminal action entitled The People of the State of California vs. Harland Jay Simpson on April 15, 1966 and probation was denied (Appendix A). The opinion and order of the Appellate Department of the Superior Court for the County of Ventura, State of California, affirming the

judgment of conviction and the order denying probation was entered on December 13, 1966 (Appendix B). On January 4, 1967, petitioner's application for certification of the case to the Court of Appeal, Second Appellate District, State of California, was denied by the said Appellate Department of the Superior Court for the County of Ventura, State of California (Appendix C). The order of said Court of Appeal, Second Appellate District, State of California, denying petitioner's application for writ of habeas corpus was entered without hearing on April 3, 1967 (Appendix D). The order of the California Supreme Court, denying petitioner's application for writ of habeas corpus was entered without hearing on May 24, 1967 (Appendix E).

Jurisdiction.

The jursidiction of this honorable Court is invoked under 28 United States Code, Section 1257(3), because the validity of a State statute on grounds of repugnancy to the United States Constitution is drawn into question.

Questions Presented.

1. Whether Section 148 of the Penal Code of the State of California is an unconstitutional statute *per se* in violation of due process of law under the Fourteenth Amendment to the United States Constitution because of vagueness.

2. Whether, assuming Section 148 of the Penal Code of the State of California is constitutional *per se*, the conviction of petitioner of a violation of said statute under the evidence presented in this case was in violation of the due process clause of the Fourteenth Amendment.

3. Whether the failure of the trial court to instruct the jury on all the elements necessary to prove the offense resulted in conviction of petitioner in violation of the due process clause of the Fourteenth Amendment.

4. Whether the procedure allowed by statute and rules of court for appeal from a conviction in a Municipal Court as applied to this case is in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Statutes Involved.

The following statutes and rules of court are involved in this case and are set forth in Appendix F:

1. Section 148 of the California Penal Code.
2. Section 4e of Article VI, California Constitution.
3. Section 1471 of the California Penal Code.
4. Rules 61 to 69, inclusive, of the California Rules of Court.

Statement of the Case.

About 3:00 A.M., January 27, 1966, Sheriff's Deputies Willard and Maschka, while on routine patrol on Highway 126 about six miles east of Fillmore, observed a 1958 Triumph sports car approach them from the rear. The car was driven by the petitioner's wife, Wilma Simpson, and the petitioner was a passenger. They were en route to their home in Bakersfield from Santa Barbara where the wife was a student at the University of California at Santa Barbara.

The deputy sheriffs were unable to gauge the speed of the car since it was approaching them from the rear. The Triumph sports car as it came closer, swung out

to the left across the double yellow line and passed the sheriff's unit. The deputies then turned on their red light and the car pulled over and stopped shortly thereafter. Deputy Sheriff Willard walked up to the driver's side of the sports car and asked for Mrs. Simpson's driver's license, which she handed to him. At said time Mrs. Simpson asked the deputy what he wanted, and he replied, "Do you see that double yellow line, that's what I want." Deputy Sheriff Willard took the driver's license and returned to the sheriff's car, and he and Deputy Sheriff Maschka proceeded to use the two-way radio to run a records check on the car and to determine if there were any possible holds outstanding for said vehicle.

After an elapse of a few minutes, Mrs. Simpson became worried with regard to the return of her operator's license and emerged from the sports car and approached the Sheriff's car, at which time she stated to them that she did not know who they were and that to her knowledge sheriff's deputies had no authority to enforce traffic laws.

While Mrs. Simpson was having this conversation with the sheriff's deputies, the petitioner became perturbed about his wife's absence and emerged from the sports car to ascertain the cause for her delay and to ascertain what was transpiring between her and the officers. The petitioner got out of the car and approached the deputies, and Deputy Willard told him to get back into the car. The petitioner refused and inquired of the officer as to what law he was breaking and why he had to return to his car. Deputy Sheriff Willard then replied, "Because I said so." The petitioner refused to comply, and placed his hands in the side pockets of his

windbreaker jacket which he was wearing, and proceeding to walk towards his wife, and at the same time made the exclamation that "I want to see what is going on with my wife." Deputy Sheriff Willard then ordered the petitioner to remove his hands from his jacket pockets, and the petitioner refused and inquired of Deputy Sheriff Willard as to what law he was breaking and why he had to remove his hands from his jacket pockets, and continued to move towards Deputy Sheriff Willard in the direction of his wife.

At this time Deputy Sheriff Willard approached the petitioner and placed his open hands on the petitioner's chest in an apparent effort to stop the petitioner's advance and compel him to return to his car. From that moment on things happened rather quickly. Deputy Sheriff Willard testified that the petitioner grabbed his arm, and the petitioner testified that he never removed his hands from the pockets of his windbreaker jacket. Both of the deputies and the petitioner engaged in a scuffle, which ended in all three of them falling and rolling to the bottom of a two or three foot embankment adjoining the shoulder of the highway. Deputy Sheriff Willard had his knee on the petitioner's chest and Deputy Sheriff Maschka had his arms around petitioner's head and neck, but no blows were struck on either side. The petitioner offered no resistance, and he was escorted back to the highway where his hands were placed behind him and he was handcuffed, searched and placed in the deputy sheriffs' car and taken to the Ventura County Jail where he was booked and jailed.

Before taking the petitioner to jail, the deputy sheriffs issued Mrs. Simpson a traffic citation for having crossed the double yellow lines. She was not arrested.

The petitioner was charged with a violation of Section 148 of the California Penal Code, which reads as follows:

"148. Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

Petitioner was found guilty by a jury of violation of the above-quoted section.

The federal questions sought to be reviewed by this honorable Court were raised before the State courts according to the procedure provided by California law, in the following manner:

1. On April 21, 1966, petitioner filed a Notice of Appeal within the time prescribed by law to the Appellate Department of the Superior Court for the County of Ventura, from both the judgment of the trial court and the order denying probation (Appendix G). The judgment and order were both affirmed by the said Appellate Department in a written opinion (Appendix B).

2. On December 27, 1966, petitioner filed in the Appellate Department of the Superior Court for the County of Ventura, an application for certification of the case to the Court of Appeal, Second Appellate District (Appendix H). Certification was denied (Appendix C). This exhaused petitioner's appellate remedies under California law for reviewing a judgment of a Municipal Court by the appellate process.

3. On March 16, 1967, Application for Writ of Habeas Corpus was filed in the Court of Appeal, Second Appellate District, State of California (Appendix I). The application was denied without a hearing or opinion on April 3, 1967 (Appendix D).

4. On May 12, 1967, Application for Writ of Habeas Corpus was filed in the Supreme Court of the State of California (Appendix J). The application was denied without a hearing or opinion on May 24, 1967 (Appendix E).

The foregoing procedures exhausted all remedies under California law, by appeal and writ.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The writ should be granted in this case for the reasons stated below as to each question presented hereinabove.

Question No. 1. (Constitutionality of Section 148 *per se*).

Section 148 of the California Penal Code is unconstitutional because it violates the well-established principle that a criminal statute must be plain and explicit, clearly informing men of common intelligence what acts are forbidden. A statute which forbids the doing of some act in terms so vague that men of common intelligence must necessarily be uncertain as to its meaning and differ as to its application violates the first essential of due process of law. (*Connally v. General Construction Co.*, 269 U.S. 385; *Yu Cong Eng v. Trinidad*, 271 U.S. 500). A decision of this Court on the constitutionality of Section 148 is of great importance for the reason that the case does not affect only

the petitioner, but also affects the rights of a great many other persons who are arrested each year for acts allegedly falling within the vague language of Section 148. The fact that a conviction was obtained on the evidence of the acts done in this case shows that the statute is applied by the courts to acts which constitute mere annoyance to police officers.

Question No. 2. (Constitutionality of application of Section 148 to this case).

Even if it should be determined that Section 148 is not unconstitutionally vague *per se*, the judgment in this case applying the section to the facts should be reviewed by this Court. Such cases as *Thompson v. City of Louisville*, 362 U.S. 199, and *Garner v. Louisiana*, 368 U.S. 157, make it plain that this Court will review cases in which the evidence presented at the trial falls so far short of indicating violation of a given penal statute that the conviction of the accused violates due process of law as to the single individual involved.

A study of the facts of this case demonstrates that the petitioner immediately prior to his arrest did in no way "delay and obstruct Deputies Willard and Maschka in the discharge or attempt to discharge a duty of their office" as charged, and for which he was convicted. Defendant was exercising his constitutional right to emerge from his automobile in order to witness the proceedings taking place between the officers and his wife, who was standing by the side of the sheriff's car.

After Mrs. Simpson brought her car to a stop, Deputy Sheriffs Willard and Maschka could not arrest her and take her without unnecessary delay before a magistrate within the county in which the offense is charged

in pursuance to California Vehicle Code Section 40302, by virtue of the fact that she did comply with the provisions of said section in that she immediately exhibited her driver's license, or other satisfactory evidence of her identity, and did not at any time refuse to give her written promise to appear in court. When Deputy Willard asked Mrs. Simpson for her driver's license, she immediately responded and handed it to him. He at no time prior to the arrest of her husband, the petitioner, asked her to sign a written promise to appear for the traffic violation. After obtaining possession of her driver's license, Deputy Sheriff Willard returned to the patrol car, and without having any reasonable or probable cause that Mrs. Simpson had committed a felony, spent a number of minutes in using the two-way radio to make a check on her car. His unjustified delay in keeping her driver's license in his possession while he was making the radio check caused Mrs. Simpson to become apprehensive about her driver's license, and she thereupon emerged from her car to inquire about the nature of the delay and justification of the proceedings, which she had a perfect right to do.

In view of the fact that it was 3:00 A.M. on a cold morning and his wife had not returned to her car, the defendant husband emerged from the vehicle solely for the purpose of ascertaining what was happening to his wife with regard to her traffic violation for having crossed the yellow double lines on the highway. There was no evidence presented whatever that the defendant intended to create a disturbance, take any aggressive action whatever towards the law enforcement officers, or create a breach of the peace, but that he emerged solely for the purpose of determining what was happening to his wife who had not returned to her car.

This conduct on the part of the defendant can in no way be construed as wilfully resjsting, delaying or obstructing a public officer in the official discharge or attempt to discharge his duties.

The crime described in Section 148 of the California Penal Code had four distinct elements: (a) wilfulness; (b) resistance, delay or obstruction; (c) a public officer; and (d) some official duty which the officer is then discharging or attempting to discharge. It was emphasized in the case of *People v. Perry*, 79 Cal. App. 2d Supp. 906, that the prosecution has the burden of proof on all four elements of the offense. In the instant case, the evidence failed to prove either (a) or (b).

Wharton's Criminal Law and Procedure, Vol. 3, p. 634, states the law to be that "merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or intefering with an officer." The most that could be said with regard to the conduct of the petitioner in the instant case is that while lawfully attempting to witness the proceedings taking place between his wife and the two deputy sheriffs, he emerged from his car and thereafter a discussion took place between him and the officers. He had a lawful right to inquire as to why he was being commanded to return to his car and not permitted to witness the proceedings, and the only justification to the officer's command that he return to his car was the exclamation "because I said so." Petitioner was then subjected to forcible pushing activity by the officer, which he had no right to do, and the petitioner may then have resisted the forcible efforts to make him return to his

car. The officers were not then attempting to make an arrest of either the petitioner or of his wife.

The evidence at the trial is uncontroverted that at the time Officer Willard commenced to push petitioner back towards or into his car that he exhibited no words or act of belligerency, that his wife had not been placed under arrest and had not refused to sign her written promise to appear, but that the petitioner emerged from his car solely for the peaceful purpose of ascertaining the nature of the proceedings being had between her and the two deputy sheriffs.

Question No. 3. (Erroneous Jury Instructions).

The trial court was under a duty to fully and properly instruct the jury with regard to the law applicable to the facts of the case. The court erred prejudically in failing to give petitioner's requested instruction on circumstantial evidence (CALJIC No. 26) because the case did in fact rest in part on circumstantial evidence by virtue of the fact that any number of circumstances surrounding the occurrence immediately prior to the arrest of the petitioner were circumstantial in nature and warranted the giving of the requested instruction.

This error, when combined with the giving of instructions offered by the prosecution that "conduct which in any manner impedes, hinders, interrupts, prevents or delays a lawful arrest" can be a violation of the statute involved, was an incorrect application of the statute in view of the fact that neither the petitioner nor his wife were being arrested when the altercation occurred. The case of *Garner v. Louisiana, supra,* creates a constitutional requirement that vague statutes, if to be upheld at all, must be given a reasonable application consistent with due process.

Question No. 4. (Discriminatory Appellate Procedure).

In 1960, the people of the State of California adopted an amendment to the California Constitution consisting of Section 4e of Article VI thereof, which provides that the District Courts of Appeal shall have appellate jurisdiction of cases within the original jurisdiction of the Municipal and Justice Courts, to the extent and in the manner provided by law (Appendix F). The Legislature subsequently enacted Section 1471 of the California Penal Code, which provides that the District Courts of Appeal may order a case transferred as provided by rules of the Judicial Council, when a Superior Court certifies, or the District Court of Appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law (Appendix B). The Judicial Council has promulgated Rules 61 to 69, inclusive, of the California Rules of Court, which establish the mechanics of the appeal procedure (Appendix B). The operation of the California system for appellate review of Municipal Court judgments is described in 15 Hastings Law Journal 11. The emphasis is on civil cases, but the procedure is essentially similar in criminal cases.

The selective and discretionary appeal procedure which has resulted from the combination of statutory law and court rules has brought about a system whereby a defendant charged with a crime which happens to fall within the original jurisdiction of the Superior Court has one method of review of his case and a de-

fendant who is unfortunate enough to be accused of a crime of lesser degree falling within the jurisdiction of a Municipal Court has quite another, and more limited, opportunity for review. The distinction between these types of crime is based on the arbitrary foundation of whether the penalty fixed is a county jail or a state prison sentence.

While it is true that procedural due process and equal protection of the laws under the United States Constitution does no require that there be a right to appeal or review of all cases, the Constitution does protect those charged with crime from discrimination by the establishement of arbitrary classifications or categories of crimes or criminal cases for the purposes of appeal. (*Cole v. Arkansas,* 333 U.S. 196; *Griffin v. Illinois,* 351 U.S. 12). When a state chooses to establish an appellate review system in criminal law, it may not, consistently with the federal constitution, foreclose some categories of accused persons from the right to the same procedure for review that is afforded others in essentially similar positions for reasons having no relation to a rational policy of criminal appeal. (*Burns v. Ohio,* 360 U.S. 252; *Griffin v. Illinois, supra*).

In the instant case the petitioner has been foreclosed from the guaranteed hearing by the normal appellate procedure he would have been able to follow if his case had fallen within the jurisdiction of the Superior Court. He has been required to follow a writ procedure resulting in his case being handled in an en-

tirely different manner which allowed denial of relief without either hearing or opinion in the higher appellate courts of the State. The procedure he has been forced to follow is arbitrary and carpricious and not based on a rational and constitutional differentiation of classes.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VINCENT P. DIGIORGIO and
MORRIS B. CHAIN,
Counsel for Petitioner.

STATE OF CALIFORNIA)
County of Ventura) ss.

I hereby certify that the foregoing is a full, true and correct copy of an entry in the minutes of the above entitled court in the above entitled cause and that I have compared the same with the original and the same is a correct transcript therefrom. Attest my hand and the seal of this court this 8th day of August, 19 67.

VENTURA COUNTY MUNICIPAL COURT DISTRICT State of California

[redacted] Byron Kane
Executive Officer and Clerk of the
Ventura County Municipal Court

By J. Cabrera, [redacted] Clerk
Assistant

MC 1021

CRIMINAL

COUNTY OF VENTURA
STATE OF CALIFORNIA

Case No. CR-118

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff

vs.

Harland Jay Simpson

Defendant

DATE	RECEIPT NO.	TYPE OF PAYMENT	AMOUNT

Charge 148 P. C.

Complainant John E. Maschka

Arresting Officer

Date 19 66	Attorney for Plaintiff	Attorney for Defendant
June 14	Certified Copy of Complaint, Copy of Clerk's Docket, Original Amended Statement on Appeal, Original Proposed Amendments to Appellant's Statement on Appeal, Copy of Plaintiff's Request for Instructions, Copy of Instructions given, Copy of Instructions refused, Copy of Notice of Appeal, Copy of Order to Extend Time, Copy of Application for Extension of Time sent to Clerk of the Superior Court.	

Earland Jay Simpson — Defendant(s).

Complaint of John E, Maschka
Accusing Officer

Date 19 66	Attorney for Plaintiff / Attorney for Defendant
Jan. 27	Complaint upon oath of John E. Maschka filed charging Earland Jay Simpson with violation of section 148 of the Penal Code.
Jan. 28	United Bonding Co. Bond #58235 for $276 posted for appearance 10:00 A.M. January 26, 1966.
	Defendant in court without counsel; complaint read and rights explained; waives time for pleading and pleads NOT GUILTY; demands trial by jury; does not waive time; jury trial set for 9:00 A.M. February 25, 1966; District Attorney notified. Bail continued. Defendant has retained Morris B. Chain of Bakersfield as counsel.
Febr. 14	Defendant appears through counsel Robert Fairbanks making a special appearance for counsel Morris B. Chain; requests that trial be consolidated with Case #T-5972S; waives all matters of time; re-set for 9 A.M. March 18, 1966; District Attorney notified; bail continued.
Mar. 14	Jury list of 40 names pulled.
Mar. 18	This matter comes on for trial with Deputy D. A. John Herrington for the People and Morris B. Chain counsel for defendants. Roll called; 35 answer; 12 seated in jury box; all prospective jurors sworn. Mr. Chain waives filing of formal complaint in case of Mrs. Wilma Simpson; citation amended on face to charge violation of section 21460 of the Vehicle Code. Jurors questioned by the Court; Manuel Ramirez is excused for cause. Defense questions and passes for cause; People question and pass for cause. Peremptory to the People; accepts jury. Peremptory to defense; accepts jury. The following jury sworn at 10:05 A.M.: 1. Mrs. Viola Garnica 2. Wayne Smith 3. Mrs. G. Taylor 4. Mrs. Dorothy Case 5. Mrs. Jean Jones 6. Mrs. Lorraine Wolf 7. Mrs. Naomi Kirby 8. Mrs. Louise Henderson 9. Neal Thompson 10. Ernest Arundell' 11. Ray Owens 12. Mrs. Eva Hesser Balance of jury panel ordered to return at 1:30 P.M. Jury addressed by Court; recess called; jury admonished. At request of defense, witnesses are excluded from court room. Opening statement by the People; opening statement by defense. People call Deputy John Maschka, who is sworn and testifies. Cross examination by defense. People call Deputy Gerald Willard, who is sworn and testifies. Cross examination by defense. Lunch recess called 12:05 to 1:00 P.M. Jury admonished. Re-convene; People rest.

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	Defense calls Wilma Jean Simpson, who is sworn and testifies. Cross examination by People. Defense calls Harland Jay Simpson, who is sworn and testifies. Cross examination by People. Defense rests. People call Lt. Raymond DeSano in rebuttal, who is sworn and testifies. People re-call Deputy Willard. People rest. Recess called; jury admonished. Final argument by People; final argument by defense; People in rebuttal. Jury instructed by Court. Bailiff sworn. To the jury at 3:20 P.M. In at 4:40 P.M. Mrs. Wilma Jean Simpson is found GUILTY as charged in citation before court. Harland Jay Simpson is found GUILTY as charged in complaint before the court. Jury polled; each agrees the decision is his. Both defendants waive time for judgment. JUDGMENT: IN the case of Mrs. Simpson, defendant shall pay a fine of $10, plus a penalty of $2; defendant pays fine. In the case of Mr. Simpson, the matter is referred to the Probation Department; hearing is set for 10:00 A.M. April 15, 1966; bail continued.
April 15	This matter comes on for hearing with defendant present with counsel Morris Chain and Deputy Probation Officer Phelan in court. Report of Probation Officer read and considered; probation is denied. Waives time for judgment. JUDGMENT: Defendant shall pay a fine of $150, plus a penalty of $16, or serve one day in the Ventura County Jail for each $5 of the fine not paid; if the fine is served, the penalty shall be waived. Defense moves for new trial; motion denied. Stay of execution granted to 9 A.M. April 22, 1966. Bail exonerated.
April 22	Notice of Appeal filed. District Attorney notified.
April 29	Statement on Appeal filed.
May 18	Application for extension of time and Order to extend time filed by District Attorney; extension of time to May 19 ordered. Proposed amendments to appellant's statement on appeal filed.
~~XXXXX~~ May 24	Hearing on statements on appeal set for 10:00 A.M. June 10, 1966; both parties notified.
June 10	Amended Statement on Appeal filed by defense counsel. Hearing on Statements on appeal held; both statements are combined into an engrossed statement on appeal.

APPENDIX B.

(Opinion of Appellate Department of Superior Court).

Superior Court, State of California, County of Ventura. Appellate Department, Time: 3:30 P.M.

CRIMINAL MINUTES

Date: December 13, 1966.

Hon. Jerome H. Berenson, Robert R. Willard & William A. Reppy Judges.

Lea Meagher—Deputy County Clerk.

None—Deputy Sheriff.

None—Court Reporter.

The People of the State of California vs. Harland Jay Simpson, No. CR 6204.

Nature of Proceedings:—Appeal—Heretofore Submitted.

The matter of appeal having heretofore been heard and submitted, the Hon. Jerome H. Berenson now files his Memorandum stating that the Judgment of Conviction and Order denying probation are and each is affirmed. The Hon. William A. Reppy files a document entitled "Explanation of Concurrence". A copy of each of said documents along with a copy of this minute order is herewith transmitted to the District Attorney and Chain & Younger, counsel for defendant.

Robert L. Hamm, County Clerk, by Lea Meager, Deputy County Clerk.

Superior Court of the State of California, for the County of Ventura, Appellate Department.

The People of the State of California, Plaintiff, vs. Harland Jay Simpson, Defendant. No. CR 6204.

Defendant Harland Jay Simpson (hereafter referred to as defendant) appeals from a judgment of conviction after being found guilty by a jury in the Municipal Court of Ventury County, Fillmore Department, of a violation of section 148 of the Penal Code. Defendant also appeals from the order of the court denying probation to him. (Pen. Code, §1466).

THE FACTS

The essential facts as gleaned from the settled statement on appeal appear to be as follows:[1]

About 3:00 a.m. on January 27, 1966 two Ventura County Deputy Sheriffs, then patrolling in a marked Ventura County Sheriff's automobile, observed a car pass them over the double lines of the highway near Fillmore, Ventura County. This was in an uninhabited area without houses and no other traffic or persons appeared to be nearby. The car did not immediately stop after the red light of the sheriff's automobile was turned on but proceeded some distance before doing so. One deputy sheriff then approached the car and obtained a driver's license from the driver who was Mrs. Simp-

[1]The settled and engrossed statement on appeal consists of an Amended Statement on Appeal prepared by the appellant and Proposed Amendments to Statement on Appeal prepared by respondent. Each was apparently considered by the trial judge as being true and correct and accurately representing the facts as adduced during the trial. Accordingly, he accepted both as the settled and engrossed statement on appeal. This has resulted in some conflicts as to what the facts are. Our recital of the facts reflects some of such conflict. Where such conflicts do occur, and for purposes of this appeal, we have accepted the appellant's version of the evidence.

son the wife of the defendant. The defendant was sitting on the passenger side of the car. The other deputy sheriff remained near the sheriff's automobile that was parked behind the car in which the Simpsons were riding. After some conversation with the driver the officer returned to his automobile and radioed for a check to ascertain if the driver or the vehicle was wanted. Shortly thereafter Mrs. Simpson got out of her car and walked to the sheriff's automobile stating that she didn't know who the deputies were and she questioned their right to stop her or their authority to enforce traffic laws. During or subsequent to the latter conversation the defendant emerged from the passenger side of the car and started to walk toward the sheriff's automobile. One of the deputy sheriffs asked or told[2] the defendant to get back in his car. He was also asked or told to take his hands out of the pockets of a jacket he was then wearing. Defendant did not comply with these orders, or requests.[3] One deputy sought to stop defendant and push him back toward defendant's car by use of his hands. An altercation then occurred in which the other deputy was also involved.[4] Defendant was arrested for violation of section 148 of the Penal Code[5] was handcuffed, was put in the sheriff's automobile, and then was transported to the County Jail in Ventura. Before leaving the scene one of the deputy sheriffs issued a citation to Mrs. Simpson for having crossed the double lines of the highway. (Veh. Code, §21460(a))

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[2]See Footnote 1, ante p. 1.

[3]See Footnote 1, ante p. 1.

[4]See Footnote 1, ante p. 1.

[5]"Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable . . ." (Pen. Code, § 148).

QUESTIONS PRESENTED

I. Was the verdict contrary to law or evidence?

II. Did the court commit error in directing the jury?

III. Did the court commit error or abuse its discretion during the course of the trial?

IV. Were defendant's constitutional rights infringed upon or impaired in respect to his arrest?

V. Did the court abuse its discretion or err in refusing to grant probation to the defendant?

Defendant contends that even if one construes favorably to the People all of the evidence introduced at the trial and as embodied in the Settled Statement on Appeal the verdict is contrary to the evidence and the law.[6] In support thereof defendant argues that no reasonable evaluation or interpretation of the evidence would support a finding that defendant "delayed and obstructed" the officers "in the discharge or attempt to discharge a duty of their office". He suggests that he was simply exercising a constitutional right to emerge from his car in order to ascertain what was taking place between the deputy sheriffs and his wife. We have concluded that the argument is devoid of merit. At the outset it should be noted that defendant was not charged with "resisting" the officer but only for "delaying and obstructing"[7] an officer in the discharge or attempt to discharge a duty of his office. There is no contention, nor could it be properly urged that the deputy sheriffs were without authority under the law to

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[6]See Footnote 1, ante p. 1.

[7]It should be noted that the language of §148 of the Penal Code is disjunctive rather than conjunctive as set forth in the complaint.

stop the car for the alleged violation of the Vehicle Code section, supra. (Pen.Code, §817; Veh.Code, §40300 et seq.) Having done so they were further entitled under all the facts of the case to consider the issuance of a citation for the moving violation (Veh. Code, §40303) and it appears manifestly clear from the evidence that it was at this point that defendant decided to emerge from the car. In our view the question of whether the statute was here violated does not rest on a determination of whether as defendant seems to suggest he had a constitutional right to leave the car. Assuming without deciding, that it would not of itself have constituted such a violation for him to leave the car and proceed toward the rear, as he did, the crucial inquiry had to do with his conduct subsequent thereto. We feel that the failure of defendant to follow the directions of the officer to return to his car and to remove his hands from his pocket when coupled with his reactions to the officer's announced concern directly generated the scuffle that ensued. Under these circumstances we conclude the jury could have reasonably found that the officers were thus delayed and obstructed in their duties pertaining to the radio check of the car, the arrest of Mrs. Simpson and issuance of a citation to her. (Veh.Code, § 40500) That they had a right to take such action inasmuch as the violation occurred in their presence cannot be controverted. (Veh.Code, §40400) Discussion by counsel in the briefs relating to the question of the right to resist a lawful or unlawful arrest (*In re Bacon*, 240 ACA 34, 53: *People v. Burns*, 198 Cal.App.2d 839) is not, of course, in point to the problem here involved simply because defendant was not so charged. It is obvious to us that the conduct of the defendant was deemed by the officers to be in viola-

tion of the statute only insofar as it related to the discharge of their duty arising from the alleged vehicle code violation. That conduct of one may be a basis for a charge of violation of section 148 of the Penal Code where it concerns only the officer's discharge of his duty in regards to another seems clear under the language of the statute. (See *People v. Powell,* 99 Cal. App.2d 178) In actuality, it appears to us that much of defendant's argument is based on the premise that the officers invited any alleged obstruction or delay to the discharge of their duty because of the unreasonableness or impropriety of their requests of or orders to defendant to return to his car and/or remove his hands from his jacket. The jury apparently concluded to the contrary and in view of the time, locale and peculiar physical facts involved we cannot say that the evidence would not justify and warrant the same. Although it may well be arguable that the officers should have controlled the situation and handled it differently than they did it is equally true that under the circumstances the defendant would have been well served to have accepted the duly constituted authority of the deputy sheriffs even though he might have sincerely believed that at the moment such was being abused. We conclude that the evidence sustains the verdict and that the verdict is not contrary to law.

The second point urged by defendant is that the court misdirected the jury in the several particulars set forth on page 4 of defendant's Amended Statement on Appeal. Item I relates to plaintiff's requested instruction #6 framed from the language in *Bacon,* supra. Defendant does not discuss this in his brief and points and authorities and, hence, it would seem that this

point has been abandoned by him. However, we have examined the instruction given and although the language used is somewhat indirect in its relevancy to the proven facts of the instant case we believe the instruction correctly states the law and that no error was committed by the court in giving it. Item 2 refers to plaintiff's requested instruction #4 but the record on appeal indicates that the proposed instruction was refused by the trial judge and not given to the jury. The same situation applies to item 3 referring to plaintiff's requested instruction #5 and this instruction also was refused by the court and not given to the jury. Of somewhat greater substance is defendant's complaint that the court erred in refusing to give Caljic #26[8] requested by defendant and the People. He urges that the instruction should have been given because the evidence included a number of important and significant matters relating to the incidents that were circumstantial in nature. Therefore, defendant believes that the failure to instruct the jury in the language of Caljic #26 took from the defendant the opportunity and right to be afforded the benefit of the circumstantial evidence rule. It is true, of course, that an instruction is neces-

[8]"If the evidence in this case (as to any particular count) is susceptible of two construction or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt."

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt." (Caljic #26).

sary if it is vital to a proper consideration of the evidence by the jury and it is incumbent upon the court in a criminal case to instruct the jury fully and fairly upon the law relating to the facts of the case. If the case of the People rests substantially or entirely on circumstantial evidence the court has a duty, of course, even on its own motion, to give the instructions on circumstantial evidence (Caljic #26 (revised), and 27-A (new) where proof of specific intent consists mainly of circumstantial evidence.[9] (*People v. Yrigoyen,* 45 Cal.2d 46; *People v. Garcia,* 169 Cal.App. 2d 368). Here no proof of specific intent was involved nor was circumstantial evidence substantially relied upon to establish the necessary links in the chain of evidence against the defendant. The evidence in the present case was primarily direct evidence. Hence, circumstantial evidence, such as there may have been, was only incidental and corroborative, at most, of the direct testimony of the witnesses. Under those circumstances the instruction was not required (*People v. Malbrough,* 55 Cal.2d 249) and no error was committed by the court in refusing to instruct the jury in the language of Caljic #26. Finally, without discussing the legal or factual basis of his claim, defendant argues that the

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[9]Penal Code section 148 is phrased in terms of "wilfully" resisting, delaying or obstructing a public officer. Penal Code section 7 provides in part: "The word 'wilfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage; . . ." The trial court gave an instruction to the jury incorporating this language as to the definition of "wilfully". In reliance upon this definition it has been held that use of the word "wilfully" in the Penal Code provision does not require a specific intent and that failure to give a circumstantial instruction on specific intent in such a case is not error.
People v. Haskins, 177 Cal.App.2d 84.

court erred in failing to instruct the jury as to the provisions of sections 40302 and 40303 of the Vehicle Code. These sections have to do with circumstances under which mandatory appearance before a magistrate is required or optional appearance before a magistrate may be required. Neither instruction was requested by the defendant and under the facts of the case neither was required to be given by the court on its own motion.

Defendant makes the claim that the trial judge committed error in certain respects during the course of the trial. One claim is that the court erred by permitting testimony to be given by the officers pertaining to the different procedures followed by them during the day and during the night. Such evidence would appear to be relevant not only to the issue of the validity of the stopping of defendant's car and subsequent arrest but also insofar as it might relate to the credibility of the officers' testimony concerning the entire transaction. Such evidence was properly received. Further, defendant complains that the court should have granted his motion that would have prevented one of the deputy sheriffs from sitting at the counsel table through the argument of the case by the prosecution and defense counsel and during the reading of instructions by the court to the jury. It is alleged that the deputy sheriff was permitted to stand in front of the jury box within a foot or two of the jury box as the jurors filed out to deliberate upon its verdict. Defendant does not specify how or in what manner he was, in fact, prejudiced by the foregoing and we perceive no error in the court's denying the motion.

Defendant makes an interesting argument that his conviction was obtained in violation of his constitu-

tional rights under the due process clause of the Fourteenth Amendment of the United States Constitution. In support thereof he has cited two United States Supreme Court cases. One of them *Thompson v. City of Louisville,* 362 U.S. 199, held that a conviction for loitering and disorderly conduct in violation of a city ordinance would be reversed where the only evidence of "disorderly conduct" was a police officer's statement that the defendant, after he was arrested, was very argumentative and that there was no evidence that the defendant engaged in any conduct at any time likely in any way to adversely affect the good order and tranquillity of the city. The court held that merely "arguing" with a police officer could not be deemed to be "disorderly conduct". The other case cited by the defendant is *Garner v. Louisiana,* 368 U.S. 157 where the court held that a conviction for the crime of disturbing the peace, in violation of a Louisiana statute, was totally devoid of evidentiary support when applied to the defendants who merely participated in a peaceful sit-in demonstration at a lunch counter for the purpose of protesting against racial segregation. Under the facts of the instant case, however, we are unable to agree that the principles announced in the foregoing cases would apply herein. The alleged conduct of the defendant, as testified to by the officers, was singularly different than that involved in the foregoing cases and, obviously, the statute under which the defendant herein was prosecuted was entirely different from that with which the defendants were charged and convicted in the foregoing cases. There is, of course, no question concerning the constitutionality of section 148 of the Penal Code. That question was disposed of and decided in *In re Bacon,* supra. We conclude that

the defendant's constitutional rights were not impaired or violated in connection with the circumstances before or subsequent to his arrest.

Finally, defendant urges that the court abused its discretion and committed error by refusing to grant probation to the defendant. Defendant asserts that the sole reason for his raising this point is to demonstrate that a reading of the probation officer's report indicates the facts surrounding the events to have occurred without any wilful conduct on the part of the defendant. Other than the foregoing it does not appear from Appellant's Opening Brief or Answering Brief that he urges the point, argues it, or makes reference to any authorities in support of his contention. Inasmuch as the probation officer's report is not a part of the record on appeal it is manifest that the court cannot consider the matter as now urged by the defendant. Further, the granting or denying of probation is committed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of abuse of discretion (*People v. Privitier*, 200 Cal.App.2d 725). No such abuse of discretion has here been shown.

The judgment of conviction and the order denying probation are and each is affirmed.

Dated: December 5, 1966.

/s/ Jerome H. Berenson
Judge of the Superior Court

We concur:

/s/ Robert R. Willard
Judge of the Superior Court

/s/ William A. Reppy
Judge of the Superior Court

Superior Court of the State of California, for the County of Ventura, Appellate Department.

The People of the State of California, Plaintiff, vs Harland Jay Simpson, Defendant. CR 6204.

EXPLANATION OF CONCURRENCE

I wish to make an explanation of my concurrence in the decision and opinion in the above-entitled case so as to make clear the basis of this concurrence as it relates to the main issue under consideration, the sufficiency of the evidence to support the verdict. I feel that essentially it is a matter of balancing the reasonableness or unreasonableness of the conduct of the defendant and of the deputy sheriffs. I believe that at one particular point in the chain of events the defendant went too far in unreasonable activity and that this was the precipitating and proximate cause of the delay of the deputies in the exercise of one of their duties which I consider to be checking out the Simpson automobile and deciding whether to issue a citation to Mrs. Simpson for the clear vehicle violation which had occurred under their observation.

I feel that it was not unreasonable for the deputies to be suspicious of the occupants of the automobile which passed them over a double line and failed to stop, when given the red light, for one-quarter of a mile, considering the remoteness of the area and the early morning hour; that it was not unreasonable for the deputies to set the "light screen" and to take the other protective measures which they did in accordance with the accepted procedure of their service. (Incidently, I believe that this testimony was admissible for the purpose of showing that the deputies appreciated the cir-

cumstances and conditions of the situation and the possibility of the occurrence of actions which could be dangerous to them which the experience of their service has taught do happen and which must be anticipated and guarded against. It was also admissible as establishing the surrounding circumstance of which Mr. Simpson should have taken cognizance. It should have alerted him to the fact that the officers were serious about the situation and caused him to govern himself accordingly.)

I feel that it was not unreasonable for the deputies to make a radio check on the status of the Simpson car, an action which caused the delay which, in turn, caused Mrs. Simpson to get out of her car and go back to the sheriff's unit, which, in turn, after a few minutes, caused Mr. Simpson to get out of the car and start back toward the sheriff's unit to see what was transpiring; that this action of Mr. Simpson, in its initial stages, was not unreasonable. I believe that it was not unreasonable for Deputy Willard to direct Mr. Simpson to get back to his car (it may have been questionable as to reasonableness for him to frame the direction to get back *into* the car, but this factor is not considered significant). I feel that it was not unreasonable for Mr. Simpson to inquire why he had to return to his car, although it is questionable as to reasonableness for Mr. Simpson to have done so with a contentious attitude (the Settled Statement uses the term "beligerent" but my choice of adjective is preferred); that it was questionable as to reasonableness for Deputy Willard to advise Mr. Simpson that it was because *he said so,* it being considered that a better answer would have been to explain that it was a matter

of security and required as standard procedure of his service. (However, in the weighing of these particular circumstances as between Mr. Simpson and the deputy, it is felt that the evaluation should militate against the position of Mr. Simpson on the basis that the deputy's reply was his way of saying that the legal basis for his direction was his authority as a peace officer.)

I further believe that it was not unreasonable for Mr. Simpson to say to the deputy that he wanted to see what was transpiring with his wife; that it was questionable as to reasonableness for the deputy not to deal with this point and not to make an explanation to reassure Mr. Simpson. (However, I conclude that this factor was not significant.) I feel that it was questionable as to reasonableness for Mr. Simpson not to follow Deputy Willard's direction to return to his car but, instead, to proceed on toward the police unit.

I further believe that it was questionable as to reasonableness for Mr. Simpson to *suddenly* thrust his hands into the pockets of his car coat at this point; that it was not unreasonable for Deputy Willard to become apprehensive when Mr. Simpson did this and continued on toward the sheriff's unit; that it was questionable as to reasonableness for Mr. Simpson to say to the deputy that he wanted to know why he had to remove his hands from his pockets; that it was not unreasonable for the deputy to advise Mr. Simpson that he did not wish to get shot; that it was unreasonable for Mr. and Mrs. Simpson to laugh at the deputy's reply and for Mr. Simpson to continue to move toward the sheriff's unit (I conclude that up to this point, that although these actions of Mr. Simpson which I have labeled as unreasonable had a bearing on the more sig-

nificant and critical event which was about to take place, they alone should not be held to have constituted a violation of Penal Code §148).

I further feel that it was reasonable for Deputy Willard to place his hands on the person of Mr. Simpson to move him back toward his own car; that it was unreasonable, and definitely the action which precipitated and which was a part of the chain of events all of which then resulted in a delay of the deputies in their attempt to discharge a duty of their office, for Mr. Simpson to grab the deputy's arm. (As indicated, this is what lead to the counter-action of the deputies and the fall of all three into what was described as a "shallow embankment" which circumstance obviously caused the delay referred to above.)

It is felt that the actions of Deputy Willard which I have described as reasonable were proper ones, carried out so that the deputy could be sure he was in control of the situation which it cannot be denied had potentials for peril. It is further felt that had Mr. Simpson complied with the first direction to return to his car or had submitted to the later and more authoritative direction of the pressure of the deputy's hands on his person (which would have been the reasonable response for him to have made at this point), the true delaying circumstances would not have occurred.

Dated this 7th day of December, 1966.

/s/ William A. Reppy
Judge

APPENDIX C.

(Order Denying Application for Certification to Court of Appeal).

Superior Court, State of California, County of Ventura, Appellate Department.

CRIMINAL MINUTES

Date: December 28, 1966.

Time: 4:00 p.m.

Hon. William A. Reppy, Jerome H. Berenson, Robert R. Willard, Presiding Judge.

Judy Dyke, Deputy County Clerk.

The People of the State of California, vs. Harland Jay Simpson No. CR-6204.

Nature of Proceedings: Order Denying Application for Certification.

Appellant's application for certification for transfer to the Court of Appeal having beenn received for filing on December 27, 1966, seven days after the judgment of this Court on appeal became final pursuant to Rule 107(b)(1) (judgment having been pronounced on December 13, 1966), said application was not filed before judgment on appeal became final [as required by Rule 63 (b)]. The application, therefore, is denied. The Court being of the opinion that a transfer is unnecessary to secure uniformity of decision or to settle important questions of law the Court declines to certify the case on its own motion.

Robert L. Hamm, County Clerk, By Judy Dyke, Deputy County Clerk.

APPENDIX D.

(Order of Court of Appeal Denying Writ of Habeas Corpus).

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

MINUTES OF APRIL 3, 1967.

Crim. No. 13326.

In re Simpson, on Habeas Corpus.

The Court: Petition for writ of Hábeas Corpus denied.

APPENDIX E.

(Order of Supreme Court Denying Writ of Habeas Corpus).

ORDER DENYING WRIT OF HABEAS CORPUS

Criminal No. 11132

In the Supreme Court of the State of California, in Bank.

In re Simpson on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

Traynor
Chief Justice

(Seal)

APPENDIX F.

(Statutes and Rules Involved).

(Statutes and Rules of Court involved in the case:

1. Sec. 148, Penal Code
2. Sec. 4e of Art. 6, Calif. Constitution
3. Sec. 1471, Penal Code
4. Rules 61 to 69, incl., Calif. Rules of Court)

APPENDIX G.

(Notice of Appeal).

In the Municipal Court, Ventura County Municipal Court, County of Ventura, State of California, Department: Fillmore.

The People of the State of California, Plaintiff, vs. Simpson, Harland Jay, Defendant. No. CR-118.

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

You Will Please Take Notice that the defendant, Harland Jay Simpson, hereby appeals from the judgment of Conviction heretofore rendered on Friday, April 15, 1966 and from the order of Court denying defendant's Application for Probation rendered on said date.

Dated: April 21, 1966.

Chain and Younger
By /s/ Morris B. Chain
Morris B. Chain
Attorneys for Appellant

APPENDIX H.

(Application for Certification).

In the Appellate Department of the Superior Court of the State of California, in and for the County of Ventura.

The People of the State of California, Plaintiff and Respondent, vs. Harland Jay Simpson, Defendant and Appellant. No. CR 6204.

APPLICATION FOR CERTIFICATION

Appellant, pursuant to Section 1471 of the Penal Code and Rules 62 and 63 of the California Rules of Court, hereby applies for certification of the within case for transfer to the Court of Appeal, Second Appellate District, for hearing and decision.

Application for such certification is made on the foling grounds:

1. There is a conflict between the decision in this case and decisions of other appellate courts in such cases as *Jackson v. Superior Court,* 98 Cal. App. 2d 187; *People v. Perry,* 79 Cal. App. 2d Supp. 906; and *People v. Burns,* 198 Cal. App. 2d Supp. 839.

2. The decision is contrary to the evidence.

3. There are errors of law in the application of Sections 148 and 1093(6) of the Penal Code, and other errors.

4. There are constitutional issues to be decided on the question of violation of due process of law. (*Thomp-*

son v. City of Louisville, 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157).

It is therefore necessary that the court certify this case for transfer to the Court of Appeal, Second Appellate District, to secure uniformity of decision and settle important questions of law.

Dated: December 23, 1966.

Chain and Younger

By Morris B. Chain

Morris B. Chain

Suite 231 Sill Building

Bakersfield, California

Attorneys for Defendant and Appellant

APPENDIX I.

(Application in Court of Appeal for Writ of Habeas Corpus).

In the Court of Appeal, State of California, Second Appellate District.

In the Matter of the Application, For Writ of Habeas Corpus Of Harland Jay Simpson.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Morris B. Chain respectfully shows:

1. That your petitioner, Morris B. Chain, is an attorney duly licensed to practice before all the courts of the State of California.

2. That petitioner is the attorney representing and defending Harland Jay Simpson, referred to hereinafter as defendant, who, on or about January 27, 1966 was charged by a complaint on file in the Municipal Court for the Ventura Judicial District, Fillmore Department, with a violation of Section 148 of he California Penal Code. On March 18, 1966 defendant was found guilty by a jury of the offense, and petitioner makes this application for a writ of habeas corpus on defendant's behalf.

3. That any and all reference made herein to a violation of the said Section 148 of the Penal Code refers to acts and events allegedly done by the said defendant on the 27th day of January, 1966, at which time it is alleged that the said defendant violated said Section 148 which reads as follows:

> "Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when

no other punishment is prescribed, is punishable by fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

4. That on March 18, 1966, trial by jury was had and the defendant was found "guilty" of a violation of Section 148 of the California Penal Code.

5. That on April 15, 1966 defendant's application for probation was denied and judgment was pronounced fining him one hundred and fifty dollars ($150.00).

6. That on or about April 21, 1966, defendant filed a Notice of Appeal to the Appellate Department of the Superior Court in and for the County of Ventura, from both the judgment and the order denying probation, said appeal being No. CR-6204 of the records and files of the said court.

7. That on or about December 5, 1966, the Appellate Department of the said Superior Court affirmed the judgment of the said Municipal Court and the verdict of the jury therein, and affirmed the order denying probation.

8. That on or about December 27, 1966, defendant filed in the Appellate Department of the Superior Court in and for the County of Ventura, an application for certification to the Court of Appeal, Second Appellate District, pursuant to Rules 61-69 of the California Rules of Court. The application for certification was made on the following grounds:

a. There is a conflict between the decision in this case and decisions of other appellate courts in such cases as *Jackson v. Superior Court*, 98 Cal. App. 2d 187; *People v. Perry*, 79 Cal. App.

2d Supp. 906; and *People v. Burns,* 198 Cal. App. 2d Supp. 839.

b. The decision is contrary to the evidence.

c. There are errors of law in the application of Sections 148 and 1093(6) of the Penal Code, and other errors.

d. There are constitutional issues to be decided on the question of violation of due process of law. (*Thompson v. City of Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157).

9. That on or about January 4, 1967, the application for certification was denied by the Appellate Department of the Superior Court in and for the County of Ventura.

10. That defendant has no other plain, speedy or adequate remedy at law, having exhausted his remedy at law by appeal to the Appellate Department of the Superior Court in and for the County of Ventura, and by filing an application for certification pursuant to Rules 61-69 of the California Rules of Court, which application was denied by the said Appellate Department of the Superior Court in and for the County of Ventura.

11. That no other petition for writ of habeas corpus has been made or filed by or on behalf of the defendant relating to this cause.

12. That the said defendant has been illegally arrested, tried, convicted, restrained of his liberty and fined.

13. That the said illegality of arrest, trial, conviction and sentence consists of this, to wit:

A. Paragraphs 1 through 12 above are incorporated herein.

B. The facts presented at the trial of this matter do not show a violation of Section 148 of the California Penal Code, and the verdict is contrary to the law and the evidence.

C. The conviction of defendant was obtained in violation of the due process clause of the Federal and State Constitutions. (Art. I, Secs. 1, 3 and 13, Calif. Const.; 14th Amend., U.S. Const.).

D. The trial court erred prejudicially in failing to instruct the jury as to the rights of the defendant at the time of the commission of the alleged offense.

E. The procedure allowed by statute and rules of court for appeal from a conviction in a municipal court as applied to this case is in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Wherefore, petitioner prays that a Writ of Habeas Corpus be issued directing that defendant be brought before this Court without delay and that this Honorable Court hear evidence concerning the legality of the arrest, trial, conviction, restraint of liberty and fine imposed upon and suffered by defendant, and upon a determination of the illegality thereof, order that the conviction of defendant be reversed and he be discharged from any restraint or legal liability for payment of fine.

Chain and Younger
By /s/ Morris B. Chain
Morris B. Chain

State of California, County of Kern—ss.

Morris B. Chain, being first duly sworn, deposes and says:

That he is one of the attorneys for Harland Jay Simpson in the foregoing Petition for Writ of Habeas Corpus; that he has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

/s/ Morris B. Chain

Subscribed and sworn to before me, this 16th day of March, 1967.

/s/ Helen C. Banducci

[Seal]

Helen C. Banducci, Notary Public. My Commission Expires July 23, 1967.

In the Court of Appeal, State of California, Second Appellate District.

In the Matter of the Application for Writ of Habeas Corpus of Harland Jay Simpson.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I

STATEMENT OF FACTS

About 3:00 A.M., January 27, 1966, Sheriff's Deputies Willard and Maschka, while on routine patrol on Highway 126 about six miles east of Fillmore, observed a 1958 Triumph sports car approach them from the rear. The car was driven by the defendant's wife, Wilma Simpson, and the defendant was a passenger. They were enroute to their home in Bakersfield from Santa Barbara where the wife was a student at the University of California at Santa Barbara.

The deputy sheriffs were unable to gauge the speed of the car since it was approaching them from the rear. The Triumph sports car as it came closer, swung out to the left across the double yellow line and passed the sheriff's unit. The deputies then turned on their red light and the car pulled over and stopped shortly thereafter. Deputy Sheriff Willard walked up to the driver's side of the sports car and asked for Mrs. Simpson's driver's license, which she handed to him. At said time Mrs. Simpson asked the deputy what he wanted, and he replied, "Do you see that double yellow line, that's what I want". Deputy Sheriff Willard took the driver's license and returned to the sheriff's car, and he and Deputy Sheriff Maschka proceeded to use the two-way radio to run a records check on the car

and to determine if there were any possible holds outstanding for said vehicle.

After an elapse of a few minutes, Mrs. Simpson became worried with regard to the return of her operator's license and emerged from the sports car and approached the Sheriff's car, at which time she stated to them that she did not know who they were and that to her knowledge sheriff's deputies had no authority to enforce traffic laws.

While Mrs. Simpson was having this conversation with the sheriff's deputies, the defendant became perturbed about his wife's absence and emerged from the sports car to ascertain the cause for her delay and to ascertain what was transpiring between her and the officers. The defendant got out of the car and approached the deputies, and Deputy Willard told him to get back into the car. The defendant refused and inquired of the officer as to what law he was breaking and why he had to return to his car. Deputy Sheriff Willard then replied, "Because I said so". The defendant refused to comply, and placed his hands in the side pockets of his windbreaker jacket which he was wearing, and proceeded to walk towards his wife, and at the same time made the exclamation that "I want to see what is going on with my wife". Deputy Sheriff Willard then ordered the defendant to remove his hands from his jacket pockets, and the defendant refused and inquired of Deputy Sheriff Willard as to what law he was breaking and why he had to remove his hands from his jacket pockets, and continued to move towards Deputy Sheriff Willard in the direction of his wife.

At this time Deputy Sheriff Willard approached the defendant and placed his open hands on the defendant's

chest in an apparent effort to stop the defendant's advance and compel him to return to his car. From that moment on things happened rather quickly. Deputy Sheriff Willard testified that the defendant grabbed his arm, and the defendant testified that he never removed his hands from the pockets of his windbreaker jacket. Both of the deputies and the defendant engaged in a scuffle, which ended in all three of them falling and rolling to the bottom of a two or three foot embankment adjoining the shoulder of the highway. Deputy Sheriff Willard had his knee on the defendant's chest and Deputy Sheriff Maschka had his arms around defendant's head and neck, but no blows were struck on either side. The defendant offered no resistance, and he was escorted back to the highway where his hands were placed behind him and he was handcuffed, searched and placed in the Deputy Sheriff's car and taken to the Ventura County Jail where he was booked and jailed.

Before taking the defendant to jail, the deputy sheriffs issued Mrs. Simpson a traffic citation for having crossed the double yellow lines.

Enroute to the Ventura County Jail, Deputy Sheriff Willard explained to the defendant his constitutional rights and asked him several times if he understood his rights, and the defendant remained silent. Deputy Sheriff Willard stated that he noticed an odor of alcohol on the defendant's breath. Defendant testified that at about 6:00 P.M. at dinner the evening before, he and his wife and some other friends had enjoyed a bottle of wine with their dinner.

II

THE FACTS DO NOT SHOW A VIOLATION OF SECTION 148 OF THE PENAL CODE, AND THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE.

Upon construing all of the evidence presented at the trial most favorable to the People as embodied in the Settled Statement on Appeal, the conviction of the defendant for having violated Section 148 of the Penal Code was not warranted or justified by virtue of the fact that the defendant immediately prior to his arrest did in no way "delay and obstruct Deputies Willard and Maschka in the discharge or attempt to discharge a duty of their office". Defendant was exercising his constitutional right to emerge from his automobile in order to witness the proceedings taking place between the officers and his wife, who was standing by the side of the sheriff's car.

After Mrs. Simpson brought her car to a stop, Deputy Sheriffs Willard and Maschka could not arrest her and take her without unnecessary delay before a magistrate within the county in which the offense is charged in pursuance to Vehicle Code Section 40302, by virtue of the fact that she did comply with the provisions of said section in that she immediately exhibited her driver's license, or other satisfactory evidence of her identity, and did not at any time refuse to give her written promise to appear in court. When Deputy Willard asked Mrs. Simpson for her driver's license, she immediately responded and handed it to him. He at no time prior to the arrest of her defendant husband asked her to sign a written promise to appear for the traffic violation. After obtaining possession of her driver's

license, Deputy Sheriff Willard returned to the patrol car, and without having any reasonable or probable cause that Mrs. Simpson had committed a felony, spent a number of minutes in using the two-way radio to make a check on her car. His unjustified delay in keeping her driver's license in his possession while he was making the radio check caused Mrs. Simpson to become apprehensive about her driver's license, and she thereupon emerged from her car to inquire about the nature and justification of the proceedings, which she had a perfect right to do.

In view of the fact that it was 3:00 A.M. on a cold morning and his wife had not returned to her car, the defendant husband emerged from the vehicle solely for the purpose of ascertaining what was happening to his wife with regard to her traffic violation for having crossed the two double lines on the highway. There was no evidence presented whatever that the defendant intended to create a disturbance, take any aggressive action whatever towards the law enforcement officers, or create a disturbance of the peace, but that he emerged solely for the purpose of determining what was happening to his wife who had not returned to her car. This conduct on the part of the defendant can in no way be construed as wilfully resisting, delaying, or obstructing a public officer in the official discharge or attempt to discharge his duties.

The crime described in Section 148 of the Penal Code has four distinct elements: (a) wilfullness; (b) resistance, delay or obstruction; (c) a public officer; (d) some official duty which the officer is then discharging or attempting to discharge. It was emphasized in the case of *People v. Perry*, 79 Cal. App. 2d Supp. 906,

that the prosecution has the burden of proof on all four elements of the offense. In the instant case, the evidence failed to prove either (a) or (b).

Wharton's Criminal Law and Procedure, Vol. 3, p. 634, states the law to be that "merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer." The most that could be said with regard to the conduct of the defendant in the instant case is that while lawfully attempting to witness the proceedings taking place between his wife and the two deputy sheriffs, he emerged from his car and thereafter a discussion took place between the defendant and the officers. He had a lawful right to inquire as to why he was being commanded to return to his car and not permitted to witness the proceedings, and the only justification to the officer's command that he return to his car was the exclamation "because I said so". Defendant was then subjected to forcible pushing activity by the officer, which he had no right to do, and defendant may then have resisted the forcible efforts to make him return to his car. This was not a situation wherein Section 834(a) of the Penal Code or the case of *People v. Burns*, 198 Cal. App. 2d Supp. 839, becomes applicable. Defendant had no reason to believe the officers were attempting to make an arrest of either himself or of his wife.

The evidence presented at the trial is uncontroverted that at the time Officer Willard commenced to push defendant back towards or into his car that he exhibited no words or act of belligerency, that his wife had not been placed under arrest and had not refused to sign her written promise to appear, but that the defendant

emerged from his car solely for the purpose of ascertaining the nature of the proceedings being had between her and the two deputy sheriffs.

Deputy Sheriff Willard's contention that he was fearful of defendant at the time he emerged from his car and was proceeding towards his wife, with particular reference to the fact that the defendant had both hands in the side pockets of his windbreaker jacket, is unequivocally contradicted by the fact that although both he and deputy sheriff Maschka were fully armed and a shotgun was also available in the patrol car, that he placed his hands forcibly against the chest of defendant in order to compel him to return to his car. If Deputy Sheriff Willard was fearful of defendant's appearance, he was entitled to command or order defendant to withdraw his hands at the point of a gun and did not have to jeopardize his personal safety by forcibly attempting to push defendant back into his car.

III

THE CONVICTION WAS OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS

In support of this contention defendant cites two cases decided in the United States Supreme Court wherein the facts were analogous to the instant case. In *Thompson v. City of Louisville* (1960) 362 U.S. 199, 4 L. ed. 2d 654, 80 S. Ct. 624, the Supreme Court reversed the conviction of the defendant on the ground that a conviction based on the evidence presented would not be consistent with the due process clause of the 14th Amendment of the United States Constitution. The defendant was shuffling his feet to the beat of music in

a cafe when arrested for loitering. Outside the cafe he argued with the officers who then charged him with disorderly conduct. The Supreme Court held that merely arguing with police officers cannot be disorderly conduct and that to convict a man without sufficient evidence under a statute is a violation of due process.

In *Garner v. Louisiana* (1961) 368 U.S. 157, 7 L. ed. 2d 207, 82 S. Ct. 248, it was held that it was a violation of due process of law to convict a man of the "catchall" violation of disturbing the peace when the evidence showed peaceful sit-in demonstrations at lunch counters. The theory of the case is that a conviction devoid of sufficient evidentiary support is unconstitutional.

Immediately prior to the arrest of defendant of the charge of having violated Section 148 of the Penal Code, defendant was exercising his constitutional right to emerge from his vehicle in order to ascertain the proceedings which were taking place between his wife and the two deputy sheriffs who were carrying on a conversation with his wife to the rear of defendant's car, and who had the operator's license of defendant's wife in their possession. The deputy sheriffs were at said time using the two-way radio to "check-out" the automobile of the defendant in order to ascertain whether or not it was a stolen car, and at said time said car was not on their list of "stolen cars". The nature and conduct of the defendant or that of his wife afforded the two deputies no reasonable or probable belief that the defendant or his wife had committed a felony, and the sole reason for stopping the vehicle of defendant and his wife was due to the fact that his wife had crossed the double yellow lines at the time she was required to stop by the two deputy sheriffs.

IV

THE TRIAL COURT ERRED PREJUDICIALLY IN FAILING TO INSTRUCT THE JURY AS TO THE RIGHTS OF THE DEFENDANT AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE

The court was under a duty, even though no instruction was submitted by the defendant, to fully and properly instruct the jury with regard to the law applicable to the facts of the case.

Under the *Perry* case, supra, the prosecutor had to prove all the elements of the statutory offense under Section 148. It was incumbent upon the trial court to instruct the jury to find all elements present in order to convict the defendant.

Penal Code Section 1093(6) states as follows:

> "The Judge may then charge the jury, and must do so on any points of law pertinent to the issue, if requested by either party; . . . ."

In *People v. Baker*, 42 Cal. 2d 550, 576 the Court held that it is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case.

The court erred in refusing to give defendant's requested instruction (CALJIC No. 26) by virtue of the fact that any number of circumstances surrounding the occurrence immediately prior to the arrest of the defendant were circumstantial in nature and warranted the giving of the requested instruction.

The court committed prejudicial error in denying defendant's motion to require Deputy Sheriff Willard to refrain from sitting at the counsel table throughout the argument of the case by the prosecution and defense counsel and throughout the reading of the instructions of the court to the jury, and in permitting said deputy to stand in front of the jury box within a foot or two of said jury box as the jurors filed out to deliberate upon its verdict.

The court erred in failing to instruct the jury as to the provisions set forth in Sections 40302 and 40303 of the California Vehicle Code.

The court erred in overruling the objection of defense counsel to the testimony of Deputy Sheriffs Willard and Maschka in permitting them to fully explain the distinction in the procedures followed by them at the time immediately preceding the arrest of defendant at 3:00 A.M. and the procedures followed by them in stopping a traffic violator during the daylight hours. The objection which defense counsel made was that said testimony on the part of the deputy sheriffs was immaterial and irrelevant and that their testimony should be restricted to the events which actually took place immediately prior to the arrest of the defendant, and that their narrative as to their reasons for following different procedures in stopping a vehicle at 3:00 A.M. and stopping a vehicle during daylight hours were self-serving and irrelevant. In each instance the objection of defense counsel was overruled.

V

HABEAS CORPUS IS THE PROPER PROCEDURE FOR RELIEF IN THIS CASE

In the case of *In re Petersen,* 51 Cal. 2d 177, it was held that the availability of a Writ of Habeas Corpus does not depend upon an actual detention in prison. *Wallace v. Edwards,* 217 Cal. App. 2d 64 held that while a case arising in a Municipal Court could not be heard by a District Court of Appeal on a direct appeal because of the limitations of statute and rules of court, the jurisdiction of the District Court of Appeal could be invoked by petition for an original writ. Also, this Second District Court of Appeal has held that the Writ of Habeas Corpus is an appropriate remedy to review the constitutionality of a statute itself or of its application to a particular defendant where the statute has a direct bearing on defendant's guilt, and the case arose in the Municipal Court. (*In re Davis,* 242 ACA 760).

In the case of *In re Zerbe,* 60 Cal. 2d 666, it was held that a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction in the Municipal Court and it it appears that the statute under which he was convicted did not prohibit his conduct.

As in the cases above cited, defendant herein has exhausted his appeal remedies and now seeks an original writ by petitioning for the writ prayed for herein.

VI

THE LIMITED PROCEDURE ALLOWED BY STATUTE AND RULES OF COURT FOR APPEAL FROM A CONVICTION IN A MUNICIPAL COURT IS DISCRIMINATORY IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In 1960, the People of the State of California adopted an amendment to the California Constitution consisting of Section 4e of Article 6 thereof, which provides that the District Courts of Appeal shall have appellate jurisdiction of cases within the original jurisdiction of the Municipal and Justice Courts, to the extent and in the manner provided by law.

The Legislature subsequently enacted Section 1471 of the California Penal Code, which provides that the District Courts of Appeal may order a case transferred as provided by rules of the Judicial Council, when a Superior Court certifies, or the District Court of Appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. The Judicial Council has promulgated Rules 61 to 69, inclusive, of the California Rules of Court, which establish the mechanics of the appeal procedure. The operation of the California system for appellate review of Municipal Court judgments is described in 15 Hastings Law Journal 11. The emphasis is on civil cases, but the procedure is similar in criminal cases.

The appeal procedure which has resulted from the combination of statutory law and court rules has

brought about a system whereby a defendant charged with a crime which happens to fall within the original jurisdiction of the Superior Court has one method of review of his case and a defendant who is unfortunate enough to be accused of a crime falling within the jurisdiction of a Municipal Court has quite another, and much restricted, opportunity for review. The distinction between these types of review is based on the arbitrary foundation of whether the penalty for the crime is a county jail sentence (misdemeanor) or a state prison sentence (felony).

While it is true that procedural due process and equal protection of the laws under the United States Constitution does not require that there be a right to appeal or review of all cases, the Constitution does protect those charged with crime from discrimination by the establishment of arbitrary classifications of categories of criminal cases for the purposes of appeal. (*Cole v. Arkansas,* 333 U.S. 196; *Griffin v. Illinois,* 351 U.S. 12). When a state chooses to establish an appellate review system in criminal cases, it may not, consistently with the federal constitution, foreclose some categories of accused persons from the right to the same procedure for review that is afforded others in essentially similar positions for reasons having no relation to a rational policy of criminal appeal. (*Burns v. Ohio,* 360 U.S. 252; *Griffin v. Illinois,* supra).

In the instant case the defendant has been foreclosed from hearing by the normal appellate procedure he would have been able to follow if his case had fallen within the jurisdiction of the Superior Court. He has been required to follow a Writ procedure which can result in denial of relief without hearing or opin-

ion. The procedure he has been forced to follow is arbitrary and capricious and not based on a rational and constitutional differentiation of classes. It thus violates the requirement of equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

VII

CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus should be granted and the Writ issued.

Respectfully submitted,

Chain and Younger
By Morris B. Chain
Morris B. Chain

APPENDIX 1

AMENDED STATEMENT ON APPEAL

In the Ventura County Municipal Judicial District Court, in and for the County of Ventura, Fillmore Department.

The People of the State of California, Plaintiff, vs. Harland Jay Simpson, Defendant. No. Cr 118.

CHARGE

On March 18, 1966, the above named defendant was found guilty by Jury of the crime of violation of Section 148 of the California Penal Code.

TESTIMONY ADDUCED AT TRIAL

About 3:00 A.M., January 27, 1966, Sheriff's Deputies Willard and Maschka, while on routine patrol on Highway 126 about six miles east of Fillmore, observed a 1958 Triumph sports car approach them from the rear. The car was driven by the defendant's wife, Wilma Simpson, and the defendant was a passenger. They were enroute to their home in Bakersfield from Santa Barbara where the wife was a student at the University of California at Santa Barbara.

The deputy sheriffs were unable to gauge the speed of the car since it was approaching them from the rear. The Triumph sports car as it came closer, swung out to the left across the double yellow line and passed the sheriff's unit. The deputies then turned on their red light and the car pulled over and stopped shortly thereafter. Deputy Sheriff Willard walked up to the driver's side of the sports car and asked for Mrs. Simpson's driver's license, which she handed to him. At said time Mrs. Simpson asked the deputy what he wanted, and he replied, "Do you see that double yellow

line, that's what I want". Deputy Sheriff Willard took the driver's license and returned to the sheriff's car, and he and Deputy Sheriff Maschka proceeded to use the two-way radio to run a records check on the car and to determine if there were any possible holds outstanding for said vehicle.

After an elapse of a few minutes, Mrs. Simpson became worried with regard to the return of her operator's license and emerged from the sports car and approached the Sheriff's car, at which time she stated to them that she did not know who they were and that to her knowledge sheriff's deputies had no authority to enforce traffic laws.

While Mrs. Simpson was having this conversation with the sheriff's deputies, the defendant became perturbed about his wife's absence and emerged from the sports car to ascertain the cause for her delay and to ascertain what was transpiring between her and the officers. The defendant got out of the car and approached the deputies, and Deputy Willard told him to get back into the car. The defendant refused and inquired of the officer as to what law he was breaking and why he had to return to his car. Deputy Sheriff Willard then replied, "Because I said so". The defendant refused to comply, and placed his hands in the side pockets of his windbreaker jacket which he was wearing, and proceeded to walk towards his wife, and at the same time made the exclamation that "I want to see what is going on with my wife". Deputy Sheriff Willard then ordered the defendant to remove his hands from his jacket pockets, and the defendant refused and inquired of Deputy Sheriff Willard as to what law he was breaking and why he had to remove his hands from his jacket pockets, and continued to

move towards Deputy Sheriff Willard in the direction of his wife.

At this time Deputy Sheriff Willard approached the defendant and placed his open hands on the defendant's chest in an apparent effort to stop the defendant's advance and compel him to return to his car. From that moment on things happened rather quickly. Deputy Sheriff Willard testified that the defendant grabbed his arm, and the defendant testified that he never removed his hands from the pockets of his windbreaker jacket. Both of the deputies and the defendant engaged in a scuffle, which ended in all three of them falling and rolling to the bottom of a two or three foot embankment adjoining the shoulder of the highway. Deputy Sheriff Willard had his knee on the defendant's chest and Deputy Sheriff Maschka had his arms around defendant's head and neck, but no blows were struck on either side. The defendant offered no resistance, and he was escorted back to the highway where his hands were placed behind him and he was handcuffed, searched, and placed in the Deputy Sheriff's car and taken to the Ventura County Jail where he was booked and jailed.

Before taking the defendant to jail, the Deputy Sheriffs issued Mrs. Simpson a traffic citation for having crossed the double yellow lines.

Enroute to the Ventura County jail, Deputy Sheriff Willard explained to the defendant his constitutional rights and asked him several times if he understood his rights, and the defendant remained silent. Deputy Sheriff Willard stated that he noticed an odor of alcohol on the defendant's breath. Defendant testified that at about 6:00 P.M. at dinner the evening before he and his wife and some other friends had enjoyed a bottle of wine with their dinner.

GROUNDS FOR APPEAL

I. THAT THE VERDICT IS CONTRARY TO LAW OR EVIDENCE IN THE FOLLOWING PARTICULARS:

1. That in construing all of the evidence presented at the trial most favorable to the People, a conviction of the defendant for having violated Section 148 of the Penal Code was not warranted or justified, by virtue of the fact that the defendant immediately prior to his arrest was exercising his constitutional right to emerge from his automobile in order to witness the proceedings taking place between the officers and his wife who was standing by the side of the sheriff's car.

2. That the acts and conduct of the defendant immediately preceding his arrest on the charge of having violated Section 148 of the Penal Code did not constitute a wilful resistance, delay or obstruction of any public officer in the discharge or attempt to discharge of any duty of his office.

II. THAT THE COURT HAS MISDIRECTED THE JURY IN THE MATTER OF LAW, OR HAS ERRED IN THE DECISION OF ANY QUESTION OF LAW ARISING DURING THE COURSE OF THE TRIAL IN THE FOLLOWING PARTICULARS:

1. That the Court erred in instructing the jury as follows:

"Conduct which in any manner impedes, hinders, interrupts, prevents, or delays a lawful arrest can be as much as physical force used upon the person of the Public Officer discharging a duty, or as little as passive resistance in the manner of going limp and relax-

ing extremities." *In re Bacon* (1966), 240 ACA 34. (Plaintiff's requested instruction No. 6)

2. That the Court erred in giving to the Jury plaintiff's requested instruction No. 4. (*Peo. v. Burns*, (1961) 198 CA 2, 139)

3. The Court erred in giving plaintiff's requestion instruction No. 5 by virtue of the fact that the defendant's wife was not being arrested nor in the process of being placed under arrest at the time defendant emerged from his vehicle to witness the proceedings taking place between his wife and the two deputy sheriffs.

4. That the Court erred in refusing to give defendant's requested instruction (CALJIC No. 26) by virtue of the fact that any number of circumstances surrounding the occurrence immediately prior to the arrest of the defendant was circumstantial in nature and warranted the giving of the requested instruction.

5. That the Court committed prejudicial error in denying defendant's motion to require Deputy Sheriff Willard to refrain from sitting at the counsel table throughout the argument of the case by the prosecution and defense counsel and throughout the reading of the instructions of the Court to the Jury, and in permitting said deputy to stand in front of the jury box within a foot or two of said jury box as the Jurors filed out to deliberate upon its verdict.

6. That the Court erred in failing to instruct the jury as to the provisions set forth in Sections 40302 and 40303 of the California Vehicle Code.

7. That the Court erred in overruling the objection of defense counsel to the testimony of Deputy

Sheriffs Willard and Maschka in permitting them to fully explain the distinction in the procedures followed by them at the time immediately preceding the arrest of defendant at 3:00 A.M. and the procedures followed by them in stopping a traffic violator during the daylight hours. The objection which defense counsel made was that said testimony on the part of the deputy sheriffs was immaterial and irrelevant and that their testimony should be restricted to the events which actually took place immediately prior to the arrest of the defendant, and that their narrative as to their reasons for following different procedures in stopping a vehicle at 3:00 A.M. and stopping a vehicle during daylight hours were self-serving and irrelevant. In each instance the objection of defense counsel was overruled.

III. THAT THE CONVICTION OF THE DEFENDANT WAS OBTAINED IN VIOLATION OF DUE PROCESS IN THE FOLLOWING PARTICULARS:

1. That immediately prior to the arrest of defendant on the charge of having violated Section 148 of the Penal Code, defendant was exercising his constitutional right to emerge from his vehicle in order to ascertain the proceedings which were taking place between his wife and the two deputy sheriffs who were carrying on a conversation with his wife to the rear of defendant's car, and who had the operator's license of defendant's wife in their possession. The deputy sheriffs were at said time using the two-way radio to "check-out" the automobile of the defendant in order to ascertain whether or not it was a stolen car, and that at said time said car was not on their list of

"stolen cars". The nature and conduct of the defendant or that of his wife afforded the two deputies no reasonable or probable belief that the defendant or his wife had committed a felony, and the sole reason for stopping the vehicle of defendant and his wife was due to the fact that his wife had crossed the double yellow lines at the time she was required to stop by the two deputy sheriffs.

IV. THAT THE COURT ABUSED ITS JUDICIAL DISCRETION IN FAILING TO GRANT DEFENDANT PROBATION UPON HIS APPLICATION THEREFORE IN THE FOLLOWING RESPECTS:

1. The sole reason for defense counsel raising this point on appeal is to show from a reading of the Probation Officer's Report that the facts surrounding the events which happened immediately prior to the arrest of defendant shows clearly that defendant in no way wilfully resisted, delayed or obstructed the two public officers in the discharge or attempt to discharge any duty of their office.

V. THAT THE COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO INSTRUCT THE JURY AS TO THE RIGHTS OF THE DEFENDANT AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE, IN THE FOLLOWING PARTICULARS:

1. That the Court was under a duty, even though no instruction was submitted by the defendant, to fully and properly instruct the Jury upon his constitutional rights at the time that his car was stopped for having crossed the double yellow lines, and that the Court should have advised the Jury fully that his con-

duct in emerging from his vehicle to witness the proceedings taking place between his wife and the two deputy sheriffs, who were situated in the sheriff's car directly behind the vehicle of defendant, was in the exercise of his constitutional rights and could not in any way be construed by the Jury as a wilful resistance, delay or obstruction of any public officer in the discharge or attempt to discharge any duty of his office. The uncontroverted facts adduced at the trial show clearly that the defendant was not committing a violation of Section 148 of the Penal Code, but had merely emerged from his vehicle in order to determine what the delay was about in his wife's receiving a traffic citation from the two sheriff's deputies. (*Peo. v. Randolph*, 147 CA 2 Supp., 836)

Dated: June 9, 1966.

Respectfully submitted,

Chain and Younger,

By Morris B. Chain.

Morris B. Chain

Attorney for Defendant

PROPOSED AMENDMENTS TO APPELLANT'S STATEMENT ON APPEAL

Ventura County Municipal Court District, County of Ventura, State of California, Fillmore Department.

The People of the State of California, Plaintiff, vs. Harland Jay Simpson, Defendant. No. CR-118.

Respondent strenuously objects to appellant's six grounds for appeal on the basis that they do not conform to Appellate Rule 184b in that:

Ground one fails to state specifically in what ways the verdict is contrary to law or evidence, and is not stated with sufficient particularity to apprise the court and the opposing party of the rulings or other matters of which the appellant intends to complain. As with each of the grounds, respondent cannot submit an adequate proposed amended statement unless appellant sufficiently indicates his ground; without this, appellant would be able to raise grounds later that could have been completely foreclosed by an adequate statement on appeal.

Ground two fails to state specifically in what matter of law the Court has misdirected the jury or specifically in which question of law arising during the course of the trial the Court has erred. Furthermore ground two is not stated with sufficient particularity to apprise the Court and the opposing party of the rulings or other matter of which the appellant intends to complain.

Ground three fails to state in what way the conviction of the appellant was obtained in violation of defendant's right to due process. Further ground three is incapable of an answer as presently worded in that

it does not conform to the requirements of rule 184b in that it is not stated with sufficient particularity to apprise the Court and the opposing party of the rulings or other matters of which the appellant intends to complain.

Ground four has not been supported by any part of the record included in appellant's statement on appeal showing that appellant objected to permitting Deputy Willard to stand in front of the jury box as the jurors filed out to deliberate on their verdict. Further there is nothing in the record to indicate the distance at which Deputy Willard stood from the jury box on the time alleged.

Ground five fails to state in which particular way the Court abused its judicial discretion in failing to grant the defendant probation upon his application. Furthermore, said ground of appeal does not conform to rule 184b in that it is not stated with sufficient particularity to apprise the Court and the opposing party of the rulings or the other matters of which the appellant intends to complain.

Ground six has failed to state in what way error was committed in failing to instruct the jury as to the rights of the defendant and has failed to state which rights of the defendant were requested in the form of instruction and in what form the request was made. Furthermore, ground six of appeal is incapable of being answered by respondent until said ground is made to conform to rule 184b and stated with sufficient particularity to apprise the Court and the opposing party of the rulings or the other matter of which the appellant intends to complain.

At the time of settlement conference, respondent will move the Court to order appellant to correct the de-

fects in his grounds of appeal and will further ask leave of Court, if necessary, to submit further amendments in response to appellant's modified grounds for appeal.

STATEMENTS OF FACTS

Mr. Harland Jay Simpson was charged with a violation of section 148 of the Penal Code arising January 27, 1966, in case number CR-118. Mrs. Wilma Jean Simpson, his wife was charged with a violation of section 21460(a) of the California Vehicle Code arising January 27, 1966 in case number T-54728. The two offenses arose out of the same incident.

February 25, 1966, Robert Fairbanks made an appearance for Morris B. Chain, counsel for Mrs. Simpson and Mr. Simpson and asked that cases number T-54728 and CR-118 be consolidated and set for jury trial March 18, 1966. This was ordered by Judge West.

On March 18, 1966, a combined jury trial was had in the Municipal Court, Fillmore and Mrs. Simpson was found guilty of a violation of section 21460(a) vehicle code and Mr. Simpson was found guilty of violation of section 148 Penal Code.

Mrs. Simpson was fined $12.00 and Mr. Simpson applied for probation. Probation was denied and Judge West ordered Mr. Simpson to pay a fine of $150.00. Only Mr. Simpson appealed.

TESTIMONY

Sheriff's Deputy John Maschka Testified as Follows:

I work for the Ventura Sheriff's Office. On January 27, 1966, around 3:00 A.M., I saw the defendants, Mr. and Mrs. Simpson, on Highway 126, six and a half miles from Fillmore. Deputy Willard and I were

on patrol, traveling eastbound on Highway 126 at about 50 MPH. There were no other cars on the road. From fifty yards east of Pacific to the old Telephone Road there were all double yellow lines on the highway.

Our sheriff's car was marked by a three foot decal on the rear spelling out the word Sheriff in fluorescent yellow paint. Our car was also marked on the sides with the sheriff's department decal, and there is a cluster of lights on the roof. Deputy Willard and I were both in uniform.

As we were going along, we saw a car approaching from the rear. It came up on us and without slowing, passed us over the double lines. We turned on the red light and started after it. The car didn't slow and it looked for a few seconds like it wasn't going to stop. After traveling approximately a quarter of a mile the car stopped and we pulled in behind it. We made a shield of lights with our bright lights and spotlight and turned it on the car. We waited approximately a half a minute before we got out. I got out on the right side of the patrol car, laid the radio microphone on the seat and stood there.

When we make a stop late at night or at this time in the early morning it is standard procedure and we are instructed to put a shield of lights on the suspect. The deputy who is riding passenger is supposed to stand on the right side of the car behind the shield where he is not visible and he can watch to see if his partner needs help. In addition the radio microphone is placed on the seat of the patrol car where it is within easy reach if there is trouble. During the day-time hours a different procedure is followed since the danger of trouble is not as great, and the deputies ride alone.

Deputy Willard got out and approached the vehicle. He asked the driver for her license. I heard the woman say what do you want. Deputy Willard made a reference to the double line. He then returned to our car, radioed for a check to see if the driver or the vehicle were wanted.

I continued to stand by the right door behind the lights. Deputy Willard was seated on the driver's side of the patrol car with his feet on the ground outside of the car, when Mrs. Simpson got out of the driver's side of her car and came back to the patrol car. She said she didn't know who we were and we had no business stopping them or enforcing traffic laws this far out and as far as she knew we were strangers.

It had been two or two and one-half minutes between the time we had stopped the Simpsons and the time Mrs. Simpson got out. Approximately three minutes after we stopped the Simpsons, Mr. Simpson got out of the passenger side of their vehicle. He started back and I said will you get back in your car, no one asked you to get out. Mr. Simpson said he had a right to get out and something about what law is there. I answered, all right, would you please get back in your car. Mr. Simpson proceeded towards the patrol car. When he was almost at the car he suddenly put his hands in his jacket pocket. Deputy Willard came over and asked him to get back in his car. Mr. Simpson stated Willard had no right to tell him to get in his car and he wanted to see what had happened to his wife. Deputy Willard said take your hands out of your pockets. Mr. Simpson stated Willard had no right to ask him to do that, and wanted to know why. Willard said that he did not want to be shot. Both Simpsons

laughed. Mr. Simpson was almost up to his wife by then. Deputy Willard who was two or three feet away from Mr. Simpson, put his hands up to move Mr. Simpson backwards. Willard put his hands on Mr. Simpson's chest and started moving him back. Mr. Simpson suddenly grabbed Willard's shirtsleeves and started to resist. I went out and put a headlock on Mr. Simpson and we all rolled into the ditch.

We held Mr. Simpson down. I was on his shoulder. While in the ditch, Mr. Simpson looked up at us and asked us why we were breathing hard. We arrested him, handcuffed him, and put him in the back of the unit. We told Mrs. Simpson she could follow us to Ventura. In the car, Mr. Simpson was advised of his rights to an attorney, to remain silent and that anything he said could be used against him. He was asked if he understood, and he answered, I understand English, do you.

On Cross Examination, the Witness Testified as Follows:

When the defendant first came back to the car, Willard said will you get back, we have a job to do and we are going to do it. He said it in a nice fashion.

Mr. Simpson did not strike us or attempt to strike us. We had his arms held as we came back to the car. We searched him for weapons and then cuffed his hands behind his back. After Mr. Simpson was put in the unit, I finished writing a citation for Mrs. Simpson. From the time of the stop to the time I finished writing the citation, ten to fifteen minutes had passed.

At first we were not going to write a citation for the driver, Mrs. Simpson, but we decided to when she failed to stop promptly when we put our red light on.

On Redirect Examination the Witness Testified as Follows:

No blows were struck by anyone because Willard had the defendant off balance and kept him that way until we went over the bank.

Sheriff's Deputy Gerald Duanne Willard Testified as Follows:

I work for the Ventura County Sheriff's Office. On January 27, 1966, I saw the Simpsons six and one-half miles east of Fillmore on Highway 126. It was 3:00 A.M. and we were on patrol. I was driving the patrol car and we were both in uniform. The vehicle is black and white and marked with gold letters and lights. It is a standard sheriff's patrol car.

We were doing 45 to 50 MPH when we saw a car come up behind us. At this point there are double yellow lines on the highway separated by a black strip. The car coming up on us was a '58 Triumph sports car. It did not slow down, it just went on past us over the double yellow lines. I immediately put on the red lights, it was a quarter of a mile before the car stopped. During that time, I went up to approximately 65 MPH.

When I got out of the car, I was wearing a green jacket with a badge on the outside of the jacket. Mrs. Simpson opened the driver's door and asked what do you want. I pointed to the center line and asked her for her license. She gave it to me, I took it back to my car and ran a check. I did this because of her belligerent attitude when I talked to her, and her failure to immediately stop. I had just finished sending the check when Mrs. Simpson came back to the car and asked, what was I, and stated that, I had no business

stopping traffic since I was not a CHP officer. I told her we were deputy sheriffs of Ventura County. Her attitude was negative, kind of a disgust for the law. Both she and Mr. Simpson would shoot questions that evening and not give us a chance to answer. While waiting for a return to my call on the radio, I heard Deputy Maschka tell the appellant, Mr. Simpson to get back into the car and then say please get back. From the time of the stop until I heard this it was approximately three minutes. I saw the defendant come forward to the front of our car, I got out and told him that we had a job to do and that we were going to do it. I told the defendant to get his hands out of his pockets and he didn't do it. The defendant said, I don't have to, and I said, you don't have to but I would appreciate it if you would. Defendant said, I won't do it. I moved forward and put my hands on his chest.

I put my hands on his chest in order to move him back toward his car. Mr. Simpson grabbed my arm and started to struggle. I don't know how to describe the amount of pressure on my arm, but I knew I was in a fight. Deputy Maschka grabbed the defendant and all of us fell over the bank. While on top of the defendant at the bottom of the bank I tried twice to get up and Mr. Simpson wouldn't let go. He would pull me down when I tried to get up. He asked us why we were breathing hard. We took him back up the bank, searched him for weapons, handcuffed him, and placed him in the unit. I advised him of his rights and asked him if he understood. He answered he understood English and asked if I did.

I was somewhat afraid when we stopped the Simpsons. It was 3:00 A.M., there were no houses along

that part of the road, just orchards. No traffic nor people in the area. A person who should have seen we were sheriffs from the rear passed us over double lines and failed to stop promptly. Mrs. Simpson had a belligerent attitude, and so did Mr. Simpson. In addition Mr. Simpson was a very tall man and looked heavy in his car coat. I didn't know what to expect when he reached into the pocket of his car coat.

During the time we were on the ground and when we placed Mr. Simpson in the unit I could smell alcohol on his breath.

On Cross Examination the Witness Testified as Follows:

I moved Mr. Simpson six or eight feet back before we fell over the bank.

Mr. Simpson was not intoxicated, but he had been drinking.

Lt. Raymond deSanno Testified as Follows:

I am a lieutenant with the Ventura County Sheriff's Office. I was on duty January 27, 1966. Between 4:30 A.M. and 5:00 A.M., I met Deputy Willard and Deputy Maschka when they arrived at the jail. I observed Mr. Harland Simpson, the man they had in custody and there was an odor of alcohol about him when he got to the jail.

PHYSICAL FACTS

The Fillmore Courtroom is a small courtroom with the jury sitting along one wall and the plaintiff and defendant seated along the other wall, these walls being about fifteen feet apart. Plaintiff and defendant, investigating officers and attorneys all sit at one table approximately five to ten feet from the jury box. On

the way out of the courtroom, the jury must pass between the jury box and the counsel table and they must necessarily pass within one or two feet of said table.

Deputy Willard was the people's investigating officer and was seated at the counsel table beside the Deputy District Attorney. Both of them were seated nearest the jury box approximately five feet from the nearest juror. At the close of testimony Mr. Chain, attorney for Mr. Simpson and Mrs. Simpson, on behalf of both defendants, made a motion to exclude the people's investigating officer during argument. This motion was denied.

At the close of argument and after the jury had been instructed, Deputy Willard and the prosecuting attorney rose from their seats at the same moment the jury stood up, and remained standing in their places until the jury had left the room. Deputy Willard sat quietly and unobtrusively, during the entire time he was seated at the counsel table. Defendants' attorney did not make any further objection or motion regarding the presence or conduct of the people's investigating officer.

/s/ John S. Herrington
John S. Herrington
Deputy District Attorney

JSH:ij

APPENDIX 2

Superior Court of the State of California, for the County of Ventura, Appellate Department.

The People of the State of California, Plaintiff, vs. Harland Jay Simpson, Defendant. No. CR 6204.

Defendant Harland Jay Simpson (hereafter referred to as defendant) appeals from a judgment of conviction after being found guilty by a jury in the Municipal Court of Ventury County, Fillmore Department, of a violation of section 148 of the Penal Code. Defendant also appeals from the order of the court denying probation to him. (Pen. Code, §1466).

THE FACTS

The essential facts as gleaned from the settled statement on appeal appear to be as follows:[1]

About 3:00 a.m. on January 27, 1966 two Ventura County Deputy Sheriffs, then patrolling in a marked Ventura County Sheriff's automobile, observed a car pass them over the double lines of the highway near Fillmore, Ventura County. This was in an uninhabited area without houses and no other traffic or persons appeared to be nearby. The car did not immediately stop after the red light of the sheriff's automobile was turned on but proceeded some distance before doing so. One deputy sheriff then approached the car and obtained a driver's license from the driver who was Mrs. Simp-

[1]The settled and engrossed statement on appeal consists of an Amended Statement on Appeal prepared by the appellant and Proposed Amendments to Statement on Appeal prepared by respondent. Each was apparently considered by the trial judge as being true and correct and accurately representing the facts as adduced during the trial. Accordingly, he accepted both as the settled and engrossed statement on appeal. This has resulted in some conflicts as to what the facts are. Our recital of the facts reflects some of such conflict. Where such conflicts do occur, and for purposes of this appeal, we have accepted the appellant's version of the evidence.

son the wife of the defendant. The defendant was sitting on the passenger side of the car. The other deputy sheriff remained near the sheriff's automobile that was parked behind the car in which the Simpsons were riding. After some conversation with the driver the officer returned to his automobile and radioed for a check to ascertain if the driver or the vehicle was wanted. Shortly thereafter Mrs. Simpson got out of her car and walked to the sheriff's automobile stating that she didn't know who the deputies were and she questioned their right to stop her or their authority to enforce traffic laws. During or subsequent to the latter conversation the defendant emerged from the passenger side of the car and started to walk toward the sheriff's automobile. One of the deputy sheriffs asked or told[2] the defendant to get back in his car. He was also asked or told to take his hands out of the pockets of a jacket he was then wearing. Defendant did not comply with these orders, or requests.[3] One deputy sought to stop defendant and push him back toward defendant's car by use of his hands. An altercation then occurred in which the other deputy was also involved.[4] Defendant was arrested for violation of section 148 of the Penal Code[5] was handcuffed, was put in the sheriff's automobile, and then was transported to the County Jail in Ventura. Before leaving the scene one of the deputy sheriffs issued a citation to Mrs. Simpson for having crossed the double lines of the highway. (Veh. Code, §21460(a).)

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[2]See Footnote 1, ante p. 1.

[3]See Footnote 1, ante p. 1.

[4]See Footnote 1, ante p. 1.

[5]"Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable . . ." (Pen. Code, § 148).

QUESTIONS PRESENTED

I. Was the verdict contrary to law or evidence?

II. Did the court commit error in directing the jury?

III. Did the court commit error or abuse its discretion during the course of the trial?

IV. Were defendant's constitutional rights infringed upon or impaired in respect to his arrest?

V. Did the court abuse its discretion or err in refusing to grant probation to the defendant?

Defendant contends that even if one construes favorably to the People all of the evidence introduced at the trial and as embodied in the Settled Statement on Appeal the verdict is contrary to the evidence and the law.[6] In support thereof defendant argues that no reasonable evaluation or interpretation of the evidence would support a finding that defendant "delayed and obstructed" the officers "in the discharge or attempt to discharge a duty of their office". He suggests that he was simply exercising a constitutional right to emerge from his car in order to ascertain what was taking place between the deputy sheriffs and his wife. We have concluded that the argument is devoid of merit. At the outset it should be noted that defendant was not charged with "resisting" the officer but only for "delaying and obstructing"[7] an officer in the discharge or attempt to discharge a duty of his office. There is no contention, nor could it be properly urged that the deputy sheriffs were without authority under the law to

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[6]See Footnote 1, ante p. 1.

[7]It should be noted that the language of §148 of the Penal Code is disjunctive rather than conjunctive as set forth in the complaint.

stop the car for the alleged violation of the Vehicle Code section, supra. (Pen.Code, §817; Veh.Code, §40300 et seq.) Having done so they were further entitled under all the facts of the case to consider the issuance of a citation for the moving violation (Veh. Code, §40303) and it appears manifestly clear from the evidence that it was at this point that defendant decided to emerge from the car. In our view the question of whether the statute was here violated does not rest on a determination of whether as defendant seems to suggest he had a constitutional right to leave the car. Assuming without deciding, that it would not of itself have constituted such a violation for him to leave the car and proceed toward the rear, as he did, the crucial inquiry had to do with his conduct subsequent thereto. We feel that the failure of defendant to follow the directions of the officer to return to his car and to remove his hands from his pocket when coupled with his reactions to the officer's announced concern directly generated the scuffle that ensued. Under these circumstances we conclude the jury could have reasonably found that the officers were thus delayed and obstructed in their duties pertaining to the radio check of the car, the arrest of Mrs. Simpson and issuance of a citation to her. (Veh.Code, § 40500) That they had a right to take such action inasmuch as the violation occurred in their presence cannot be controverted. (Veh.Code, §40400) Discussion by counsel in the briefs relating to the question of the right to resist a lawful or unlawful arrest (*In re Bacon*, 240 ACA 34, 53: *People v. Burns*, 198 Cal.App.2d 839) is not, of course, in point to the problem here involved simply because defendant was not so charged. It is obvious to us that the conduct of the defendant was deemed by the officers to be in viola-

tion of the statute only insofar as it related to the discharge of their duty arising from the alleged vehicle code violation. That conduct of one may be a basis for a charge of violation of section 148 of the Penal Code where it concerns only the officer's discharge of his duty in regards to another seems clear under the language of the statute. (See *People v. Powell*, 99 Cal. App.2d 178) In actuality, it appears to us that much of defendant's argument is based on the premise that the officers invited any alleged obstruction or delay to the discharge of their duty because of the unreasonableness or impropriety of their requests of or orders to defendant to return to his car and/or remove his hands from his jacket. The jury apparently concluded to the contrary and in view of the time, locale and peculiar physical facts involved we cannot say that the evidence would not justify and warrant the same. Although it may well be arguable that the officers should have controlled the situation and handled it differently than they did it is equally true that under the circumstances the defendant would have been well served to have accepted the duly constituted authority of the deputy sheriffs even though he might have sincerely believed that at the moment such was being abused. We conclude that the evidence sustains the verdict and that the verdict is not contrary to law.

The second point urged by defendant is that the court misdirected the jury in the several particulars set forth on page 4 of defendant's Amended Statement on Appeal. Item I relates to plaintiff's requested instruction #6 framed from the language in *Bacon*, supra. Defendant does not discuss this in his brief and points and authorities and, hence, it would seem that this

point has been abandoned by him. However, we have examined the instruction given and although the language used is somewhat indirect in its relevancy to the proven facts of the instant case we believe the instruction correctly states the law and that no error was committed by the court in giving it. Item 2 refers to plaintiff's requested instruction #4 but the record on appeal indicates that the proposed instruction was refused by the trial judge and not given to the jury. The same situation applies to item 3 referring to plaintiff's requested instruction #5 and this instruction also was refused by the court and not given to the jury. Of somewhat greater substance is defendant's complaint that the court erred in refusing to give Caljic #26[8] requested by defendant and the People. He urges that the instruction should have been given because the evidence included a number of important and significant matters relating to the incidents that were circumstantial in nature. Therefore, defendant believes that the failure to instruct the jury in the language of Caljic #26 took from the defendant the opportunity and right to be afforded the benefit of the circumstantial evidence rule. It is true, of course, that an instruction is neces-

[8]"If the evidence in this case (as to any particular count) is susceptible of two construction or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt."

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt." (Caljic #26).

sary if it is vital to a proper consideration of the evidence by the jury and it is incumbent upon the court in a criminal case to instruct the jury fully and fairly upon the law relating to the facts of the case. If the case of the People rests substantially or entirely on circumstantial evidence the court has a duty, of course, even on its own motion, to give the instructions on circumstantial evidence (Caljic #26 (revised), and 27-A (new) where proof of specific intent consists mainly of circumstantial evidence.[9] (*People v. Yrigoyen,* 45 Cal.2d 46; *People v. Garcia,* 169 Cal.App. 2d 368). Here no proof of specific intent was involved nor was circumstantial evidence substantially relied upon to establish the necessary links in the chain of evidence against the defendant. The evidence in the present case was primarily direct evidence. Hence, circumstantial evidence, such as there may have been, was only incidental and corroborative, at most, of the direct testimony of the witnesses. Under those circumstances the instruction was not required (*People v. Malbrough,* 55 Cal.2d 249) and no error was committed by the court in refusing to instruct the jury in the language of Caljic #26. Finally, without discussing the legal or factual basis of his claim, defendant argues that the

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[9]Penal Code section 148 is phrased in terms of "wilfully" resisting, delaying or obstructing a public officer. Penal Code section 7 provides in part: "The word 'wilfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage; . . ." The trial court gave an instruction to the jury incorporating this language as to the definition of "wilfully". In reliance upon this definition it has been held that use of the word "wilfully" in the Penal Code provision does not require a specific intent and that failure to give a circumstantial instruction on specific intent in such a case is not error.
People v. Haskins, 177 Cal.App.2d 84.

court erred in failing to instruct the jury as to the provisions of sections 40302 and 40303 of the Vehicle Code. These sections have to do with circumstances under which mandatory appearance before a magistrate is required or optional appearance before a magistrate may be required. Neither instruction was requested by the defendant and under the facts of the case neither was required to be given by the court on its own motion.

Defendant makes the claim that the trial judge committed error in certain respects during the course of the trial. One claim is that the court erred by permitting testimony to be given by the officers pertaining to the different procedures followed by them during the day and during the night. Such evidence would appear to be relevant not only to the issue of the validity of the stopping of defendant's car and subsequent arrest but also insofar as it might relate to the credibility of the officers' testimony concerning the entire transaction. Such evidence was properly received. Further, defendant complains that the court should have granted his motion that would have prevented one of the deputy sheriffs from sitting at the counsel table through the argument of the case by the prosecution and defense counsel and during the reading of instructions by the court to the jury. It is alleged that the deputy sheriff was permitted to stand in front of the jury box within a foot or two of the jury box as the jurors filed out to deliberate upon its verdict. Defendant does not specify how or in what manner he was, in fact, prejudiced by the foregoing and we perceive no error in the court's denying the motion.

Defendant makes an interesting argument that his conviction was obtained in violation of his constitu-

tional rights under the due process clause of the Fourteenth Amendment of the United States Constitution. In support thereof he has cited two United States Supreme Court cases. One of them *Thompson v. City of Louisville,* 362 U.S. 199, held that a conviction for loitering and disorderly conduct in violation of a city ordinance would be reversed where the only evidence of "disorderly conduct" was a police officer's statement that the defendant, after he was arrested, was very argumentative and that there was no evidence that the defendant engaged in any conduct at any time likely in any way to adversely affect the good order and tranquillity of the city. The court held that merely "arguing" with a police officer could not be deemed to be "disorderly conduct". The other case cited by the defendant is *Garner v. Louisiana,* 368 U.S. 157 where the court held that a conviction for the crime of disturbing the peace, in violation of a Louisiana statute, was totally devoid of evidentiary support when applied to the defendants who merely participated in a peaceful sit-in demonstration at a lunch counter for the purpose of protesting against racial segregation. Under the facts of the instant case, however, we are unable to agree that the principles announced in the foregoing cases would apply herein. The alleged conduct of the defendant, as testified to by the officers, was singularly different than that involved in the foregoing cases and, obviously, the statute under which the defendant herein was prosecuted was entirely different from that with which the defendants were charged and convicted in the foregoing cases. There is, of course, no question concerning the constitutionality of section 148 of the Penal Code. That question was disposed of and decided in *In re Bacon,* supra. We conclude that

the defendant's constitutional rights were not impaired or violated in connection with the circumstances before or subsequent to his arrest.

Finally, defendant urges that the court abused its discretion and committed error by refusing to grant probation to the defendant. Defendant asserts that the sole reason for his raising this point is to demonstrate that a reading of the probation officer's report indicates the facts surrounding the events to have occurred without any wilful conduct on the part of the defendant. Other than the foregoing it does not appear from Appellant's Opening Brief or Answering Brief that he urges the point, argues it, or makes reference to any authorities in support of his contention. Inasmuch as the probation officer's report is not a part of the record on appeal it is manifest that the court cannot consider the matter as now urged by the defendant. Further, the granting or denying of probation is committed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of abuse of discretion (*People v. Privitier*, 200 Cal.App.2d 725). No such abuse of discretion has here been shown.

The judgment of conviction and the order denying probation are and each is affirmed.

Dated: December 5, 1966.

/s/ Jerome H. Berenson
Judge of the Superior Court

We concur:

/s/ Robert R. Willard
Judge of the Superior Court

/s/ William A. Reppy
Judge of the Superior Court

Superior Court of the State of California, for the County of Ventura, Appellate Department.

The People of the State of California, Plaintiff, vs Harland Jay Simpson, Defendant. CR 6204.

EXPLANATION OF CONCURRENCE

I wish to make an explanation of my concurrence in the decision and opinion in the above-entitled case so as to make clear the basis of this concurrence as it relates to the main issue under consideration, the sufficiency of the evidence to support the verdict. I feel that essentially it is a matter of balancing the reasonableness or unreasonableness of the conduct of the defendant and of the deputy sheriffs. I believe that at one particular point in the chain of events the defendant went too far in unreasonable activity and that this was the precipitating and proximate cause of the delay of the deputies in the exercise of one of their duties which I consider to be checking out the Simpson automobile and deciding whether to issue a citation to Mrs. Simpson for the clear vehicle violation which had occurred under their observation.

I feel that it was not unreasonable for the deputies to be suspicious of the occupants of the automobile which passed them over a double line and failed to stop, when given the red light, for one-quarter of a mile, considering the remoteness of the area and the early morning hour; that it was not unreasonable for the deputies to set the "light screen" and to take the other protective measures which they did in accordance with the accepted procedure of their service. (Incidently, I believe that this testimony was admissible for the purpose of showing that the deputies appreciated the cir-

cumstances and conditions of the situation and the possibility of the occurrence of actions which could be dangerous to them which the experience of their service has taught do happen and which must be anticipated and guarded against. It was also admissible as establishing the surrounding circumstance of which Mr. Simpson should have taken cognizance. It should have alerted him to the fact that the officers were serious about the situation and caused him to govern himself accordingly.)

I feel that it was not unreasonable for the deputies to make a radio check on the status of the Simpson car, an action which caused the delay which, in turn, caused Mrs. Simpson to get out of her car and go back to the sheriff's unit, which, in turn, after a few minutes, caused Mr. Simpson to get out of the car and start back toward the sheriff's unit to see what was transpiring; that this action of Mr. Simpson, in its initial stages, was not unreasonable. I believe that it was not unreasonable for Deputy Willard to direct Mr. Simpson to get back to his car (it may have been questionable as to reasonableness for him to frame the direction to get back *into* the car, but this factor is not considered significant). I feel that it was not unreasonable for Mr. Simpson to inquire why he had to return to his car, although it is questionable as to reasonableness for Mr. Simpson to have done so with a contentious attitude (the Settled Statement uses the term "beligerent" but my choice of adjective is preferred); that it was questionable as to reasonableness for Deputy Willard to advise Mr. Simpson that it was because *he said so*, it being considered that a better answer would have been to explain that it was a matter

of security and required as standard procedure of his service. (However, in the weighing of these particular circumstances as between Mr. Simpson and the deputy, it is felt that the evaluation should militate against the position of Mr. Simpson on the basis that the deputy's reply was his way of saying that the legal basis for his direction was his authority as a peace officer.)

I further believe that it was not unreasonable for Mr. Simpson to say to the deputy that he wanted to see what was transpiring with his wife; that it was questionable as to reasonableness for the deputy not to deal with this point and not to make an explanation to reassure Mr. Simpson. (However, I conclude that this factor was not significant.) I feel that it was questionable as to reasonableness for Mr. Simpson not to follow Deputy Willard's direction to return to his car but, instead, to proceed on toward the police unit.

I further believe that it was questionable as to reasonableness for Mr. Simpson to *suddenly* thrust his hands into the pockets of his car coat at this point; that it was not unreasonable for Deputy Willard to become apprehensive when Mr. Simpson did this and continued on toward the sheriff's unit; that it was questionable as to reasonableness for Mr. Simpson to say to the deputy that he wanted to know why he had to remove his hands from his pockets; that it was not unreasonable for the deputy to advise Mr. Simpson that he did not wish to get shot; that it was unreasonable for Mr. and Mrs. Simpson to laugh at the deputy's reply and for Mr. Simpson to continue to move toward the sheriff's unit (I conclude that up to this point, that although these actions of Mr. Simpson which I have labeled as unreasonable had a bearing on the more sig-

nificant and critical event which was about to take place, they alone should not be held to have constituted a violation of Penal Code §148).

I further feel that it was reasonable for Deputy Willard to place his hands on the person of Mr. Simpson to move him back toward his own car; that it was unreasonable, and definitely the action which precipitated and which was a part of the chain of events all of which then resulted in a delay of the deputies in their attempt to discharge a duty of their office, for Mr. Simpson to grab the deputy's arm. (As indicated, this is what lead to the counter-action of the deputies and the fall of all three into what was described as a "shallow embankment" which circumstance obviously caused the delay referred to above.)

It is felt that the actions of Deputy Willard which I have described as reasonable were proper ones, carried out so that the deputy could be sure he was in control of the situation which it cannot be denied had potentials for peril. It is further felt that had Mr. Simpson complied with the first direction to return to his car or had submitted to the later and more authoritative direction of the pressure of the deputy's hands on his person (which would have been the reasonable response for him to have made at this point), the true delaying circumstances would not have occurred.

Done this 7th day of December, 1966.

/s/ William A. Reppy
Judge

APPENDIX J.

(Application in Supreme Court for Writ of Habeas Corpus).

In the Supreme Court of the State of California.

In the Matter of the Application, For Writ of Habeas Corpus Of Harland Jay Simpson.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Morris B. Chain respectfully shows:

1. That your petitioner, Morris B. Chain, is an attorney duly licensed to practice before all the courts of the State of California.

2. That petitioner is the attorney representing and defending Harland Jay Simpson, referred to hereinafter as defendant, who, on or about January 27, 1966 was charged by a complaint on file in the Municipal Court for the Ventura Judicial District, Fillmore Department, with a violation of Section 148 of he California Penal Code. On March 18, 1966 defendant was found guilty by a jury of the offense, and petitioner makes this application for a writ of habeas corpus on defendant's behalf.

3. That any and all reference made herein to a violation of the said Section 148 of the Penal Code refers to acts and events allegedly done by the said defendant on the 27th day of January, 1966, at which time it is alleged that the said defendant violated said Section 148 which reads as follows:

> "Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when

no other punishment is prescribed, is punishable by fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

4. That on March 18, 1966, trial by jury was had and the defendant was found "guilty" of a violation of Section 148 of the California Penal Code.

5. That on April 15, 1966 defendant's application for probation was denied and judgment was pronounced fining him one hundred and fifty dollars ($150.00).

6. That on or about April 21, 1966, defendant filed a Notice of Appeal to the Appellate Department of the Superior Court in and for the County of Ventura, from both the judgment and the order denying probation, said appeal being No. CR-6204 of the records and files of the said court.

7. That on or about December 5, 1966, the Appellate Department of the said Superior Court affirmed the judgment of the said Municipal Court and the verdict of the jury therein, and affirmed the order denying probation.

8. That on or about December 27, 1966, defendant filed in the Appellate Department of the Superior Court in and for the County of Ventura, an application for certification to the Court of Appeal, Second Appellate District, pursuant to Rules 61-69 of the California Rules of Court. The application for certification was made on the following grounds:

a. There is a conflict between the decision in this case and decisions of other appellate courts in such cases as *Jackson v. Superior Court,* 98 Cal. App. 2d 187; *People v. Perry,* 79 Cal. App.

2d Supp. 906; and *People v. Burns*, 198 Cal. App. 2d Supp. 839.

b. The decision is contrary to the evidence.

c. There are errors of law in the application of Sections 148 and 1093(6) of the Penal Code, and other errors.

d. There are constitutional issues to be decided on the question of violation of due process of law. (*Thompson v. City of Louisville*, 362 U.S. 199; *Garner v. Louisiana*, 368 U.S. 157).

9. That on or about January 4, 1967, the application for certification was denied by the Appellate Department of the Superior Court in and for the County of Ventura.

10. That defendant has no other plain, speedy or adequate remedy at law, having exhausted his remedy at law by appeal to the Appellate Department of the Superior Court in and for the County of Ventura, and by filing an application for certification pursuant to Rules 61-69 of the California Rules of Court, which application was denied by the said Appellate Department of the Superior Court in and for the County of Ventura.

11. That on March 16, 1967, Application for Writ of Habeas Corpus was filed in the Court of Appeal, Second Appellate District, and that said application was denied without hearing on April 3, 1967.

12. That the said defendant has been illegally arrested, tried, convicted, restrained of his liberty and fined.

13. That the said illegality of arrest, trial, conviction and sentence consists of this, to wit:

A. Paragraphs 1 through 12 above are incorporated herein.

B. The facts presented at the trial of this matter do not show a violation of Section 148 of the California Penal Code, and the verdict is contrary to the law and the evidence.

C. The conviction of defendant was obtained in violation of the due process clause of the Federal and State Constitutions. (Art. I, Secs. 1, 3 and 13, Calif. Const.; 14th Amend., U.S. Const.).

D. The trial court erred prejudicially in failing to instruct the jury as to the rights of the defendant at the time of the commission of the alleged offense.

E. The procedure allowed by statute and rules of court for appeal from a conviction in a municipal court as applied to this case is in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Wherefore, petitioner prays that a Writ of Habeas Corpus be issued directing that defendant be brought before this Court without delay and that this Honorable Court hear evidence concerning the legality of the arrest, trial, conviction, restraint of liberty and fine imposed upon and suffered by defendant, and upon a determination of the illegality thereof, order that the conviction of defendant be reversed and he be discharged from any restraint or legal liability for payment of fine.

Chain and Younger
By /s/ Morris B. Chain
Morris B. Chain

State of California, County of Kern—ss.

Morris B. Chain, being first duly sworn, deposes and says:

That he is one of the attorneys for Harland Jay Simpson in the foregoing Petition for Writ of Habeas Corpus; that he has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

/s/ Morris B. Chain

Subscribed and sworn to before me, this 12th day of May, 1967.

/s/ Helen C. Banducci

[Seal]

Helen C. Banducci, Notary Public. My Commission Expires July 23, 1967.

In the Supreme Court of the State of California.

In the Matter of the Application for Writ of Habeas Corpus of Harland Jay Simpson.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I

STATEMENT OF FACTS

About 3:00 A.M., January 27, 1966, Sheriff's Deputies Willard and Maschka, while on routine patrol on Highway 126 about six miles east of Fillmore, observed a 1958 Triumph sports car approach them from the rear. The car was driven by the defendant's wife, Wilma Simpson, and the defendant was a passenger. They were enroute to their home in Bakersfield from Santa Barbara where the wife was a student at the University of California at Santa Barbara.

The deputy sheriffs were unable to gauge the speed of the car since it was approaching them from the rear. The Triumph sports car as it came closer, swung out to the left across the double yellow line and passed the sheriff's unit. The deputies then turned on their red light and the car pulled over and stopped shortly thereafter. Deputy Sheriff Willard walked up to the driver's side of the sports car and asked for Mrs. Simpson's driver's license, which she handed to him. At said time Mrs. Simpson asked the deputy what he wanted, and he replied, "Do you see that double yellow line, that's what I want". Deputy Sheriff Willard took the driver's license and returned to the sheriff's car, and he and Deputy Sheriff Maschka proceeded to use the two-way radio to run a records check on the car

and to determine if there were any possible holds outstanding for said vehicle.

After an elapse of a few minutes, Mrs. Simpson became worried with regard to the return of her operator's license and emerged from the sports car and approached the Sheriff's car, at which time she stated to them that she did not know who they were and that to her knowledge sheriff's deputies had no authority to enforce traffic laws.

While Mrs. Simpson was having this conversation with the sheriff's deputies, the defendant became perturbed about his wife's absence and emerged from the sports car to ascertain the cause for her delay and to ascertain what was transpiring between her and the officers. The defendant got out of the car and approached the deputies, and Deputy Willard told him to get back into the car. The defendant refused and inquired of the officer as to what law he was breaking and why he had to return to his car. Deputy Sheriff Willard then replied, "Because I said so". The defendant refused to comply, and placed his hands in the side pockets of his windbreaker jacket which he was wearing, and proceeded to walk towards his wife, and at the same time made the exclamation that "I want to see what is going on with my wife". Deputy Sheriff Willard then ordered the defendant to remove his hands from his jacket pockets, and the defendant refused and inquired of Deputy Sheriff Willard as to what law he was breaking and why he had to remove his hands from his jacket pockets, and continued to move towards Deputy Sheriff Willard in the direction of his wife.

At this time Deputy Sheriff Willard approached the defendant and placed his open hands on the defendant's

chest in an apparent effort to stop the defendant's advance and compel him to return to his car. From that moment on things happened rather quickly. Deputy Sheriff Willard testified that the defendant grabbed his arm, and the defendant testified that he never removed his hands from the pockets of his windbreaker jacket. Both of the deputies and the defendant engaged in a scuffle, which ended in all three of them falling and rolling to the bottom of a two or three foot embankment adjoining the shoulder of the highway. Deputy Sheriff Willard had his knee on the defendant's chest and Deputy Sheriff Maschka had his arms around defendant's head and neck, but no blows were struck on either side. The defendant offered no resistance, and he was escorted back to the highway where his hands were placed behind him and he was handcuffed, searched and placed in the Deputy Sheriff's car and taken to the Ventura County Jail where he was booked and jailed.

Before taking the defendant to jail, the deputy sheriffs issued Mrs. Simpson a traffic citation for having crossed the double yellow lines.

Enroute to the Ventura County Jail, Deputy Sheriff Willard explained to the defendant his constitutional rights and asked him several times if he understood his rights, and the defendant remained silent. Deputy Sheriff Willard stated that he noticed an odor of alcohol on the defendant's breath. Defendant testified that at about 6:00 P.M. at dinner the evening before, he and his wife and some other friends had enjoyed a bottle of wine with their dinner.

II

THE FACTS DO NOT SHOW A VIOLATION OF SECTION 148 OF THE PENAL CODE, AND THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE.

Upon construing all of the evidence presented at the trial most favorable to the People as embodied in the Settled Statement on Appeal, the conviction of the defendant for having violated Section 148 of the Penal Code was not warranted or justified by virtue of the fact that the defendant immediately prior to his arrest did in no way "delay and obstruct Deputies Willard and Maschka in the discharge or attempt to discharge a duty of their office". Defendant was exercising his constitutional right to emerge from his automobile in order to witness the proceedings taking place between the officers and his wife, who was standing by the side of the sheriff's car.

After Mrs. Simpson brought her car to a stop, Deputy Sheriffs Willard and Maschka could not arrest her and take her without unnecessary delay before a magistrate within the county in which the offense is charged in pursuance to Vehicle Code Section 40302, by virtue of the fact that she did comply with the provisions of said section in that she immediately exhibited her driver's license, or other satisfactory evidence of her identity, and did not at any time refuse to give her written promise to appear in court. When Deputy Willard asked Mrs. Simpson for her driver's license, she immediately responded and handed it to him. He at no time prior to the arrest of her defendant husband asked her to sign a written promise to appear for the traffic violation. After obtaining possession of her driver's

license, Deputy Sheriff Willard returned to the patrol car, and without having any reasonable or probable cause that Mrs. Simpson had committed a felony, spent a number of minutes in using the two-way radio to make a check on her car. His unjustified delay in keeping her driver's license in his possession while he was making the radio check caused Mrs. Simpson to become apprehensive about her driver's license, and she thereupon emerged from her car to inquire about the nature and justification of the proceedings, which she had a perfect right to do.

In view of the fact that it was 3:00 A.M. on a cold morning and his wife had not returned to her car, the defendant husband emerged from the vehicle solely for the purpose of ascertaining what was happening to his wife with regard to her traffic violation for having crossed the two double lines on the highway. There was no evidence presented whatever that the defendant intended to create a disturbance, take any aggressive action whatever towards the law enforcement officers, or create a disturbance of the peace, but that he emerged solely for the purpose of determining what was happening to his wife who had not returned to her car. This conduct on the part of the defendant can in no way be construed as wilfully resisting, delaying, or obstructing a public officer in the official discharge or attempt to discharge his duties.

The crime described in Section 148 of the Penal Code has four distinct elements: (a) wilfullness; (b) resistance, delay or obstruction; (c) a public officer; (d) some official duty which the officer is then discharging or attempting to discharge. It was emphasized in the case of *People v. Perry*, 79 Cal. App. 2d Supp. 906,

that the prosecution has the burden of proof on all four elements of the offense. In the instant case, the evidence failed to prove either (a) or (b).

Wharton's Criminal Law and Procedure, Vol. 3, p. 634, states the law to be that "merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer." The most that could be said with regard to the conduct of the defendant in the instant case is that while lawfully attempting to witness the proceedings taking place between his wife and the two deputy sheriffs, he emerged from his car and thereafter a discussion took place between the defendant and the officers. He had a lawful right to inquire as to why he was being commanded to return to his car and not permitted to witness the proceedings, and the only justification to the officer's command that he return to his car was the exclamation "because I said so". Defendant was then subjected to forcible pushing activity by the officer, which he had no right to do, and defendant may then have resisted the forcible efforts to make him return to his car. This was not a situation wherein Section 834(a) of the Penal Code or the case of *People v. Burns*, 198 Cal. App. 2d Supp. 839, becomes applicable. Defendant had no reason to believe the officers were attempting to make an arrest of either himself or of his wife.

The evidence presented at the trial is uncontroverted that at the time Officer Willard commenced to push defendant back towards or into his car that he exhibited no words or act of belligerency, that his wife had not been placed under arrest and had not refused to sign her written promise to appear, but that the defendant

emerged from his car solely for the purpose of ascertaining the nature of the proceedings being had between her and the two deputy sheriffs.

Deputy Sheriff Willard's contention that he was fearful of defendant at the time he emerged from his car and was proceeding towards his wife, with particular reference to the fact that the defendant had both hands in the side pockets of his windbreaker jacket, is unequivocally contradicted by the fact that although both he and deputy sheriff Maschka were fully armed and a shotgun was also available in the patrol car, that he placed his hands forcibly against the chest of defendant in order to compel him to return to his car. If Deputy Sheriff Willard was fearful of defendant's appearance, he was entitled to command or order defendant to withdraw his hands at the point of a gun and did not have to jeopardize his personal safety by forcibly attempting to push defendant back into his car.

III

THE CONVICTION WAS OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS

In support of this contention defendant cites two cases decided in the United States Supreme Court wherein the facts were analogous to the instant case. In *Thompson v. City of Louisville* (1960) 362 U.S. 199, 4 L. ed. 2d 654, 80 S. Ct. 624, the Supreme Court reversed the conviction of the defendant on the ground that a conviction based on the evidence presented would not be consistent with the due process clause of the 14th Amendment of the United States Constitution. The defendant was shuffling his feet to the beat of music in

a cafe when arrested for loitering. Outside the cafe he argued with the officers who then charged him with disorderly conduct. The Supreme Court held that merely arguing with police officers cannot be disorderly conduct and that to convict a man without sufficient evidence under a statute is a violation of due process.

In *Garner v. Louisiana* (1961) 368 U.S. 157, 7 L. ed. 2d 207, 82 S. Ct. 248, it was held that it was a violation of due process of law to convict a man of the "catchall" violation of disturbing the peace when the evidence showed peaceful sit-in demonstrations at lunch counters. The theory of the case is that a conviction devoid of sufficient evidentiary support is unconstitutional.

Immediately prior to the arrest of defendant of the charge of having violated Section 148 of the Penal Code, defendant was exercising his constitutional right to emerge from his vehicle in order to ascertain the proceedings which were taking place between his wife and the two deputy sheriffs who were carrying on a conversation with his wife to the rear of defendant's car, and who had the operator's license of defendant's wife in their possession. The deputy sheriffs were at said time using the two-way radio to "check-out" the automobile of the defendant in order to ascertain whether or not it was a stolen car, and at said time said car was not on their list of "stolen cars". The nature and conduct of the defendant or that of his wife afforded the two deputies no reasonable or probable belief that the defendant or his wife had committed a felony, and the sole reason for stopping the vehicle of defendant and his wife was due to the fact that his wife had crossed the double yellow lines at the time she was required to stop by the two deputy sheriffs.

IV

THE TRIAL COURT ERRED PREJUDICIALLY IN FAILING TO INSTRUCT THE JURY AS TO THE RIGHTS OF THE DEFENDANT AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE

The court was under a duty, even though no instruction was submitted by the defendant, to fully and properly instruct the jury with regard to the law applicable to the facts of the case.

Under the *Perry* case, supra, the prosecutor had to prove all the elements of the statutory offense under Section 148. It was incumbent upon the trial court to instruct the jury to find all elements present in order to convict the defendant.

Penal Code Section 1093(6) states as follows:

> "The Judge may then charge the jury, and must do so on any points of law pertinent to the issue, if requested by either party; . . . ."

In *People v. Baker*, 42 Cal. 2d 550, 576 the Court held that it is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case.

The court erred in refusing to give defendant's requested instruction (CALJIC No. 26) by virtue of the fact that any number of circumstances surrounding the occurrence immediately prior to the arrest of the defendant were circumstantial in nature and warranted the giving of the requested instruction.

The court committed prejudicial error in denying defendant's motion to require Deputy Sheriff Willard to refrain from sitting at the counsel table throughout the argument of the case by the prosecution and defense counsel and throughout the reading of the instructions of the court to the jury, and in permitting said deputy to stand in front of the jury box within a foot or two of said jury box as the jurors filed out to deliberate upon its verdict.

The court erred in failing to instruct the jury as to the provisions set forth in Sections 40302 and 40303 of the California Vehicle Code.

The court erred in overruling the objection of defense counsel to the testimony of Deputy Sheriffs Willard and Maschka in permitting them to fully explain the distinction in the procedures followed by them at the time immediately preceding the arrest of defendant at 3:00 A.M. and the procedures followed by them in stopping a traffic violator during the daylight hours. The objection which defense counsel made was that said testimony on the part of the deputy sheriffs was immaterial and irrelevant and that their testimony should be restricted to the events which actually took place immediately prior to the arrest of the defendant, and that their narrative as to their reasons for following different procedures in stopping a vehicle at 3:00 A.M. and stopping a vehicle during daylight hours were self-serving and irrelevant. In each instance the objection of defense counsel was overruled.

V

HABEAS CORPUS IS THE PROPER PROCEDURE FOR RELIEF IN THIS CASE

In the case of *In re Petersen,* 51 Cal. 2d 177, it was held that the availability of a Writ of Habeas Corpus does not depend upon an actual detention in prison. *Wallace v. Edwards,* 217 Cal. App. 2d 64 held that while a case arising in a Municipal Court could not be heard by a District Court of Appeal on a direct appeal because of the limitations of statute and rules of court, the jurisdiction of the District Court of Appeal could be invoked by petition for an original writ. Also, this Second District Court of Appeal has held that the Writ of Habeas Corpus is an appropriate remedy to review the constitutionality of a statute itself or of its application to a particular defendant where the statute has a direct bearing on defendant's guilt, and the case arose in the Municipal Court. (*In re Davis,* 242 ACA 760).

In the case of *In re Zerbe,* 60 Cal. 2d 666, it was held that a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction in the Municipal Court and it it appears that the statute under which he was convicted did not prohibit his conduct.

As in the cases above cited, defendant herein has exhausted his appeal remedies and now seeks an original writ by petitioning for the writ prayed for herein.

VI

THE LIMITED PROCEDURE ALLOWED BY STATUTE AND RULES OF COURT FOR APPEAL FROM A CONVICTION IN A MUNICIPAL COURT IS DISCRIMINATORY IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In 1960, the People of the State of California adopted an amendment to the California Constitution consisting of Section 4e of Article 6 thereof, which provides that the District Courts of Appeal shall have appellate jurisdiction of cases within the original jurisdiction of the Municipal and Justice Courts, to the extent and in the manner provided by law.

The Legislature subsequently enacted Section 1471 of the California Penal Code, which provides that the District Courts of Appeal may order a case transferred as provided by rules of the Judicial Council, when a Superior Court certifies, or the District Court of Appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. The Judicial Council has promulgated Rules 61 to 69, inclusive, of the California Rules of Court, which establish the mechanics of the appeal procedure. The operation of the California system for appellate review of Municipal Court judgments is described in 15 Hastings Law Journal 11. The emphasis is on civil cases, but the procedure is similar in criminal cases.

The appeal procedure which has resulted from the combination of statutory law and court rules has

brought about a system whereby a defendant charged with a crime which happens to fall within the original jurisdiction of the Superior Court has one method of review of his case and a defendant who is unfortunate enough to be accused of a crime falling within the jurisdiction of a Municipal Court has quite another, and much restricted, opportunity for review. The distinction between these types of review is based on the arbitrary foundation of whether the penalty for the crime is a county jail sentence (misdemeanor) or a state prison sentence (felony).

While it is true that procedural due process and equal protection of the laws under the United States Constitution does not require that there be a right to appeal or review of all cases, the Constitution does protect those charged with crime from discrimination by the establishment of arbitrary classifications of categories of criminal cases for the purposes of appeal. (*Cole v. Arkansas*, 333 U.S. 196; *Griffin v. Illinois*, 351 U.S. 12). When a state chooses to establish an appellate review system in criminal cases, it may not, consistently with the federal constitution, foreclose some categories of accused persons from the right to the same procedure for review that is afforded others in essentially similar positions for reasons having no relation to a rational policy of criminal appeal. (*Burns v. Ohio*, 360 U.S. 252; *Griffin v. Illinois*, supra).

In the instant case the defendant has been foreclosed from hearing by the normal appellate procedure he would have been able to follow if his case had fallen within the jurisdiction of the Superior Court. He has been required to follow a Writ procedure which can result in denial of relief without hearing or opin-

ion, The procedure he has been forced to follow is arbitrary and capricious and not based on a rational and constitutional differentiation of classes. It thus violates the requirement of equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

VII

CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus should be granted and the Writ issued.

Respectfully submitted,

Chain and Younger

By Morris B. Chain

Morris B. Chain

APPENDIX 1

AMENDED STATEMENT ON APPEAL

In the Ventura County Municipal Judicial District Court, in and for the County of Ventura, Fillmore Department.

The People of the State of California, Plaintiff, vs. Harland Jay Simpson, Defendant. No. Cr 118.

CHARGE

On March 18, 1966, the above named defendant was found guilty by Jury of the crime of violation of Section 148 of the California Penal Code.

TESTIMONY ADDUCED AT TRIAL

About 3:00 A.M., January 27, 1966, Sheriff's Deputies Willard and Maschka, while on routine patrol on Highway 126 about six miles east of Fillmore, observed a 1958 Triumph sports car approach them from the rear. The car was driven by the defendant's wife, Wilma Simpson, and the defendant was a passenger. They were enroute to their home in Bakersfield from Santa Barbara where the wife was a student at the University of California at Santa Barbara.

The deputy sheriffs were unable to gauge the speed of the car since it was approaching them from the rear. The Triumph sports car as it came closer, swung out to the left across the double yellow line and passed the sheriff's unit. The deputies then turned on their red light and the car pulled over and stopped shortly thereafter. Deputy Sheriff Willard walked up to the driver's side of the sports car and asked for Mrs. Simpson's driver's license, which she handed to him. At said time Mrs. Simpson asked the deputy what he wanted, and he replied, "Do you see that double yellow

line, that's what I want". Deputy Sheriff Willard took the driver's license and returned to the sheriff's car, and he and Deputy Sheriff Maschka proceeded to use the two-way radio to run a records check on the car and to determine if there were any possible holds outstanding for said vehicle.

After an elapse of a few minutes, Mrs. Simpson became worried with regard to the return of her operator's license and emerged from the sports car and approached the Sheriff's car, at which time she stated to them that she did not know who they were and that to her knowledge sheriff's deputies had no authority to enforce traffic laws.

While Mrs. Simpson was having this conversation with the sheriff's deputies, the defendant became perturbed about his wife's absence and emerged from the sports car to ascertain the cause for her delay, and to ascertain what was transpiring between her and the officers. The defendant got out of the car and approached the deputies, and Deputy Willard told him to get back into the car. The defendant refused and inquired of the officer as to what law he was breaking and why he had to return to his car. Deputy Sheriff Willard then replied, "Because I said so". The defendant refused to comply, and placed his hands in the side pockets of his windbreaker jacket which he was wearing, and proceeded to walk towards his wife, and at the same time made the exclamation that "I want to see what is going on with my wife". Deputy Sheriff Willard then ordered the defendant to remove his hands from his jacket pockets, and the defendant refused and inquired of Deputy Sheriff Willard as to what law he was breaking and why he had to remove his hands from his jacket pockets, and continued to

move towards Deputy Sheriff Willard in the direction of his wife.

At this time Deputy Sheriff Willard approached the defendant and placed his open hands on the defendant's chest in an apparent effort to stop the defendant's advance and compel him to return to his car. From that moment on things happened rather quickly. Deputy Sheriff Willard testified that the defendant grabbed his arm, and the defendant testified that he never removed his hands from the pockets of his windbreaker jacket. Both of the deputies and the defendant engaged in a scuffle, which ended in all three of them falling and rolling to the bottom of a two or three foot embankment adjoining the shoulder of the highway. Deputy Sheriff Willard had his knee on the defendant's chest and Deputy Sheriff Maschka had his arms around defendant's head and neck, but no blows were struck on either side The defendant offered no resistance, and he was escorted back to the highway where his hands were placed behind him and he was handcuffed, searched, and placed in the Deputy Sheriff's car and taken to the Ventura County Jail where he was booked and jailed.

Before taking the defendant to jail, the Deputy Sheriffs issued Mrs. Simpson a traffic citation for having crossed the double yellow lines.

Enroute to the Ventura County jail, Deputy Sheriff Willard explained to the defendant his constitutional rights and asked him several times if he understood his rights, and the defendant remained silent. Deputy Sheriff Willard stated that he noticed an odor of alcohol on the defendant's breath. Defendant testified that at about 6:00 P.M. at dinner the evening before he and his wife and some other friends had enjoyed a bottle of wine with their dinner.

GROUNDS FOR APPEAL

I. THAT THE VERDICT IS CONTRARY TO LAW OR EVIDENCE IN THE FOLLOWING PARTICULARS:

1. That in construing all of the evidence presented at the trial most favorable to the People, a conviction of the defendant for having violated Section 148 of the Penal Code was not warranted or justified, by virtue of the fact that the defendant immediately prior to his arrest was exercising his constitutional right to emerge from his automobile in order to witness the proceedings taking place between the officers and his wife who was standing by the side of the sheriff's car.

2. That the acts and conduct of the defendant immediately preceding his arrest on the charge of having violated Section 148 of the Penal Code did not constitute a wilful resistance, delay or obstruction of any public officer in the discharge or attempt to discharge of any duty of his office.

II. THAT THE COURT HAS MISDIRECTED THE JURY IN THE MATTER OF LAW, OR HAS ERRED IN THE DECISION OF ANY QUESTION OF LAW ARISING DURING THE COURSE OF THE TRIAL IN THE FOLLOWING PARTICULARS:

1. That the Court erred in instructing the jury as follows:

"Conduct which in any manner impedes, hinders, interrupts, prevents, or delays a lawful arrest can be as much as physical force used upon the person of the Public Officer discharging a duty, or as little as passive resistance in the manner of going limp and relax-

ing extremities." *In re Bacon* (1966), 240 ACA 34. (Plaintiff's requested instruction No. 6)

2. That the Court erred in giving to the Jury plaintiff's requested instruction No. 4. (*Peo. v. Burns*, (1961) 198 CA 2, 139)

3. The Court erred in giving plaintiff's requestion instruction No. 5 by virtue of the fact that the defendant's wife was not being arrested nor in the process of being placed under arrest at the time defendant emerged from his vehicle to witness the proceedings taking place between his wife and the two deputy sheriffs.

4. That the Court erred in refusing to give defendant's requested instruction (CALJIC No. 26) by virtue of the fact that any number of circumstances surrounding the occurrence immediately prior to the arrest of the defendant was circumstantial in nature and warranted the giving of the requested instruction.

5. That the Court committed prejudicial error in denying defendant's motion to require Deputy Sheriff Willard to refrain from sitting at the counsel table throughout the argument of the case by the prosecution and defense counsel and throughout the reading of the instructions of the Court to the Jury, and in permitting said deputy to stand in front of the jury box within a foot or two of said jury box as the Jurors filed out to deliberate upon its verdict.

6. That the Court erred in failing to instruct the jury as to the provisions set forth in Sections 40302 and 40303 of the California Vehicle Code.

7. That the Court erred in overruling the objection of defense counsel to the testimony of Deputy

Sheriffs Willard and Maschka in permitting them to fully explain the distinction in the procedures followed by them at the time immediately preceding the arrest of defendant at 3:00 A.M. and the procedures followed by them in stopping a traffic violator during the daylight hours. The objection which defense counsel made was that said testimony on the part of the deputy sheriffs was immaterial and irrelevant and that their testimony should be restricted to the events which actually took place immediately prior to the arrest of the defendant, and that their narrative as to their reasons for following different procedures in stopping a vehicle at 3:00 A.M. and stopping a vehicle during daylight hours were self-serving and irrelevant. In each instance the objection of defense counsel was overruled.

III. THAT THE CONVICTION OF THE DEFENDANT WAS OBTAINED IN VIOLATION OF DUE PROCESS IN THE FOLLOWING PARTICULARS:

1. That immediately prior to the arrest of defendant on the charge of having violated Section 148 of the Penal Code, defendant was exercising his constitutional right to emerge from his vehicle in order to ascertain the proceedings which were taking place between his wife and the two deputy sheriffs who were carrying on a conversation with his wife to the rear of defendant's car, and who had the operator's license of defendant's wife in their possession. The deputy sheriffs were at said time using the two-way radio to "check-out" the automobile of the defendant in order to ascertain whether or not it was a stolen car, and that at said time said car was not on their list of

"stolen cars". The nature and conduct of the defendant or that of his wife afforded the two deputies no reasonable or probable belief that the defendant or his wife had committed a felony, and the sole reason for stopping the vehicle of defendant and his wife was due to the fact that his wife had crossed the double yellow lines at the time she was required to stop by the two deputy sheriffs.

IV. THAT THE COURT ABUSED ITS JUDICIAL DISCRETION IN FAILING TO GRANT DEFENDANT PROBATION UPON HIS APPLICATION THEREFORE IN THE FOLLOWING RESPECTS:

1. The sole reason for defense counsel raising this point on appeal is to show from a reading of the Probation Officer's Report that the facts surrounding the events which happened immediately prior to the arrest of defendant shows clearly that defendant in no way wilfully resisted, delayed or obstructed the two public officers in the discharge or attempt to discharge any duty of their office.

V. THAT THE COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO INSTRUCT THE JURY AS TO THE RIGHTS OF THE DEFENDANT AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE, IN THE FOLLOWING PARTICULARS:

1. That the Court was under a duty, even though no instruction was submitted by the defendant, to fully and properly instruct the Jury upon his constitutional rights at the time that his car was stopped for having crossed the double yellow lines, and that the Court should have advised the Jury fully that his con-

duct in emerging from his vehicle to witness the proceedings taking place between his wife and the two deputy sheriffs, who were situated in the sheriff's car directly behind the vehicle of defendant, was in the exercise of his constitutional rights and could not in any way be construed by the Jury as a wilful resistance, delay or obstruction of any public officer in the discharge or attempt to discharge any duty of his office. The uncontroverted facts adduced at the trial show clearly that the defendant was not committing a violation of Section 148 of the Penal Code, but had merely emerged from his vehicle in order to determine what the delay was about in his wife's receiving a traffic citation from the two sheriff's deputies. (*Peo. v. Randolph*, 147 CA 2 Supp., 836)

Dated: June 9, 1966.

Respectfully submitted,

Chain and Younger,

By Morris B. Chain

Morris B. Chain

Attorney for Defendant

APPENDIX 1

PROPOSED AMENDMENTS TO APPELLANT'S STATEMENT ON APPEAL

Ventura County Municipal Court District, County of Ventura, State of California, Fillmore Department.

The People of the State of California, Plaintiff, vs. Harland Jay Simpson, Defendant. No. CR-118.

Respondent strenuously objects to appellant's six grounds for appeal on the basis that they do not conform to Appellate Rule 184b in that:

Ground one fails to state specifically in what ways the verdict is contrary to law or evidence, and is not stated with sufficient particularity to apprise the court and the opposing party of the rulings or other matters of which the appellant intends to complain. As with each of the grounds, respondent cannot submit an adequate proposed amended statement unless appellant sufficiently indicates his ground; without this, appellant would be able to raise grounds later that could have been completely foreclosed by an adequate statement on appeal.

Ground two fails to state specifically in what matter of law the Court has misdirected the jury or specifically in which question of law arising during the course of the trial the Court has erred. Furthermore ground two is not stated with sufficient particularity to apprise the Court and the opposing party of the rulings or other matter of which the appellant intends to complain.

Ground three fails to state in what way the conviction of the appellant was obtained in violation of defendant's right to due process. Further ground three is incapable of an answer as presently worded in that

it does not conform to the requirements of rule 184b in that it is not stated with sufficient particularity to apprise the Court and the opposing party of the rulings or other matters of which the appellant intends to complain.

Ground four has not been supported by any part of the record included in appellant's statement on appeal showing that appellant objected to permitting Deputy Willard to stand in front of the jury box as the jurors filed out to deliberate on their verdict. Further there is nothing in the record to indicate the distance at which Deputy Willard stood from the jury box on the time alleged.

Ground five fails to state in which particular way the Court abused its judicial discretion in failing to grant the defendant probation upon his application. Furthermore, said ground of appeal does not conform to rule 184b in that it is not stated with sufficient particularity to apprise the Court and the opposing party of the rulings or the other matters of which the appellant intends to complain.

Ground six has failed to state in what way error was committed in failing to instruct the jury as to the rights of the defendant and has failed to state which rights of the defendant were requested in the form of instruction and in what form the request was made. Furthermore, ground six of appeal is incapable of being answered by respondent until said ground is made to conform to rule 184b and stated with sufficient particularity to apprise the Court and the opposing party of the rulings or the other matter of which the appellant intends to complain.

At the time of settlement conference, respondent will move the Court to order appellant to correct the de-

fects in his grounds of appeal and will further ask leave of Court, if necessary, to submit further amendments in response to appellant's modified grounds for appeal.

STATEMENTS OF FACTS

Mr. Harland Jay Simpson was charged with a violation of section 148 of the Penal Code arising January 27, 1966, in case number CR-118. Mrs. Wilma Jean Simpson, his wife was charged with a violation of section 21460(a) of the California Vehicle Code arising January 27, 1966 in case number T-54728. The two offenses arose out of the same incident.

February 25, 1966, Robert Fairbanks made an appearance for Morris B. Chain, counsel for Mrs. Simpson and Mr. Simpson and asked that cases number T-54728 and CR-118 be consolidated and set for jury trial March 18, 1966. This was ordered by Judge West.

On March 18, 1966, a combined jury trial was had in the Municipal Court, Fillmore and Mrs. Simpson was found guilty of a violation of section 21460(a) vehicle code and Mr. Simpson was found guilty of violation of section 148 Penal Code.

Mrs. Simpson was fined $12.00 and Mr. Simpson applied for probation. Probation was denied and Judge West ordered Mr. Simpson to pay a fine of $150.00. Only Mr. Simpson appealed.

TESTIMONY

Sheriff's Deputy John Maschka
Testified as Follows:

I work for the Ventura Sheriff's Office. On January 27, 1966, around 3:00 A.M., I saw the defendants, Mr. and Mrs. Simpson, on Highway 126, six and a half miles from Fillmore. Deputy Willard and I were

on patrol, traveling eastbound on Highway 126 at about 50 MPH. There were no other cars on the road. From fifty yards east of Pacific to the old Telephone Road there were all double yellow lines on the highway.

Our sheriff's car was marked by a three foot decal on the rear spelling out the word Sheriff in fluorescent yellow paint. Our car was also marked on the sides with the sheriff's department decal, and there is a cluster of lights on the roof. Deputy Willard and I were both in uniform.

As we were going along, we saw a car approaching from the rear. It came up on us and without slowing, passed us over the double lines. We turned on the red light and started after it. The car didn't slow and it looked for a few seconds like it wasn't going to stop. After traveling approximately a quarter of a mile the car stopped and we pulled in behind it. We made a shield of lights with our bright lights and spotlight and turned it on the car. We waited approximately a half a minute before we got out. I got out on the right side of the patrol car, laid the radio microphone on the seat and stood there.

When we make a stop late at night or at this time in the early morning it is standard procedure and we are instructed to put a shield of lights on the suspect. The deputy who is riding passenger is supposed to stand on the right side of the car behind the shield where he is not visible and he can watch to see if his partner needs help. In addition the radio microphone is placed on the seat of the patrol car where it is within easy reach if there is trouble. During the day-time hours a different procedure is followed since the danger of trouble is not as great, and the deputies ride alone.

Deputy Willard got out and approached the vehicle. He asked the driver for her license. I heard the woman say what do you want. Deputy Willard made a reference to the double line. He then returned to our car, radioed for a check to see if the driver or the vehicle were wanted.

I continued to stand by the right door behind the lights. Deputy Willard was seated on the driver's side of the patrol car with his feet on the ground outside of the car, when Mrs. Simpson got out of the driver's side of her car and came back to the patrol car. She said she didn't know who we were and we had no business stopping them or enforcing traffic laws this far out and as far as she knew we were strangers.

It had been two or two and one-half minutes between the time we had stopped the Simpsons and the time Mrs. Simpson got out. Approximately three minutes after we stopped the Simpsons, Mr. Simpson got out of the passenger side of their vehicle. He started back and I said will you get back in your car, no one asked you to get out. Mr. Simpson said he had a right to get out and something about what law is there. I answered, all right, would you please get back in your car. Mr. Simpson proceeded towards the patrol car. When he was almost at the car he suddenly put his hands in his jacket pocket. Deputy Willard came over and asked him to get back in his car. Mr. Simpson stated Willard had no right to tell him to get in his car and he wanted to see what had happened to his wife. Deputy Willard said take your hands out of your pockets. Mr. Simpson stated Willard had no right to ask him to do that, and wanted to know why. Willard said that he did not want to be shot. Both Simpsons

laughed. Mr. Simpson was almost up to his wife by then. Deputy Willard who was two or three feet away from Mr. Simpson, put his hands up to move Mr. Simpson backwards. Willard put his hands on Mr. Simpson's chest and started moving him back. Mr. Simpson suddenly grabbed Willard's shirtsleeves and started to resist. I went out and put a headlock on Mr. Simpson and we all rolled into the ditch.

We held Mr. Simpson down. I was on his shoulder. While in the ditch, Mr. Simpson looked up at us and asked us why we were breathing hard. We arrested him, handcuffed him, and put him in the back of the unit. We told Mrs. Simpson she could follow us to Ventura. In the car, Mr. Simpson was advised of his rights to an attorney, to remain silent and that anything he said could be used against him. He was asked if he understood, and he answered, I understand English, do you.

On Cross Examination, the Witness Testified as Follows:

When the defendant first came back to the car, Willard said will you get back, we have a job to do and we are going to do it. He said it in a nice fashion.

Mr. Simpson did not strike us or attempt to strike us. We had his arms held as we came back to the car. We searched him for weapons and then cuffed his hands behind his back. After Mr. Simpson was put in the unit, I finished writing a citation for Mrs. Simpson. From the time of the stop to the time I finished writing the citation, ten to fifteen minutes had passed.

At first we were not going to write a citation for the driver, Mrs. Simpson, but we decided to when she failed to stop promptly when we put our red light on.

On Redirect Examination the Witness Testified as Follows:

No blows were struck by anyone because Willard had the defendant off balance and kept him that way until we went over the bank.

Sheriff's Deputy Gerald Duanne Willard Testified as Follows:

I work for the Ventura County Sheriff's Office. On January 27, 1966, I saw the Simpsons six and one-half miles east of Fillmore on Highway 126. It was 3:00 A.M. and we were on patrol. I was driving the patrol car and we were both in uniform. The vehicle is black and white and marked with gold letters and lights. It is a standard sheriff's patrol car.

We were doing 45 to 50 MPH when we saw a car come up behind us. At this point there are double yellow lines on the highway separated by a black strip. The car coming up on us was a '58 Triumph sports car. It did not slow down, it just went on past us over the double yellow lines. I immediately put on the red lights, it was a quarter of a mile before the car stopped. During that time, I went up to approximately 65 MPH.

When I got out of the car, I was wearing a green jacket with a badge on the outside of the jacket. Mrs. Simpson opened the driver's door and asked what do you want. I pointed to the center line and asked her for her license. She gave it to me, I took it back to my car and ran a check. I did this because of her belligerent attitude when I talked to her, and her failure to immediately stop. I had just finished sending the check when Mrs. Simpson came back to the car and asked, what was I, and stated that, I had no business

stopping traffic since I was not a CHP officer. I told her we were deputy sheriffs of Ventura County. Her attitude was negative, kind of a disgust for the law. Both she and Mr. Simpson would shoot questions that evening and not give us a chance to answer. While waiting for a return to my call on the radio, I heard Deputy Maschka tell the appellant, Mr. Simpson to get back into the car and then say please get back. From the time of the stop until I heard this it was approximately three minutes. I saw the defendant come forward to the front of our car, I got out and told him that we had a job to do and that we were going to do it. I told the defendant to get his hands out of his pockets and he didn't do it. The defendant said, I don't have to, and I said, you don't have to but I would appreciate it if you would. Defendant said, I won't do it. I moved forward and put my hands on his chest.

I put my hands on his chest in order to move him back toward his car. Mr. Simpson grabbed my arm and started to struggle. I don't know how to describe the amount of pressure on my arm, but I knew I was in a fight. Deputy Maschka grabbed the defendant and all of us fell over the bank. While on top of the defendant at the bottom of the bank I tried twice to get up and Mr. Simpson wouldn't let go. He would pull me down when I tried to get up. He asked us why we were breathing hard. We took him back up the bank, searched him for weapons, handcuffed him, and placed him in the unit. I advised him of his rights and asked him if he understood. He answered he understood English and asked if I did.

I was somewhat afraid when we stopped the Simpsons. It was 3:00 A.M., there were no houses along

that part of the road, just orchards. No traffic nor people in the area. A person who should have seen we were sheriffs from the rear passed us over double lines and failed to stop promptly. Mrs. Simpson had a belligerent attitude, and so did Mr. Simpson. In addition Mr. Simpson was a very tall man and looked heavy in his car coat. I didn't know what to expect when he reached into the pocket of his car coat.

During the time we were on the ground and when we placed Mr. Simpson in the unit I could smell alcohol on his breath.

On Cross Examination the Witness Testified as Follows:

I moved Mr. Simpson six or eight feet back before we fell over the bank.

Mr. Simpson was not intoxicated, but he had been drinking.

Lt. Raymond deSanno Testified as Follows:

I am a lieutenant with the Ventura County Sheriff's Office. I was on duty January 27, 1966. Between 4:30 A.M. and 5:00 A.M., I met Deputy Willard and Deputy Maschka when they arrived at the jail. I observed Mr. Harland Simpson, the man they had in custody and there was an odor of alcohol about him when he got to the jail.

PHYSICAL FACTS

The Fillmore Courtroom is a small courtroom with the jury sitting along one wall and the plaintiff and defendant seated along the other wall, these walls being about fifteen feet apart. Plaintiff and defendant, investigating officers and attorneys all sit at one table approximately five to ten feet from the jury box. On

the way out of the courtroom, the jury must pass between the jury box and the counsel table and they must necessarily pass within one or two feet of said table.

Deputy Willard was the people's investigating officer and was seated at the counsel table beside the Deputy District Attorney. Both of them were seated nearest the jury box approximately five feet from the nearest juror. At the close of testimony Mr. Chain, attorney for Mr. Simpson and Mrs. Simpson, on behalf of both defendants, made a motion to exclude the people's investigating officer during argument. This motion was denied.

At the close of argument and after the jury had been instructed, Deputy Willard and the prosecuting attorney rose from their seats at the same moment the jury stood up, and remained standing in their places until the jury had left the room. Deputy Willard sat quietly and unobtrusively during the entire time he was seated at the counsel table. Defendants' attorney did not make any further objection or motion regarding the presence or conduct of the people's investigating officer.

/s/ John S. Herrington
John S. Herrington
Deputy District Attorney

JSH:ij